ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
10997 HOUSE RULES

Now that I understand the appropriation limit, "How does the spending limit work?"

The House State Affairs Committee amended the resolution so that paragraph (c) instructs the governor to reduce expenditures by line item veto to the extent necessary to avoid spending more than the amount appropriated.

The impact of this change is that the governor is given mandated veto power and does not restrict the branch of government from which the veto is taken (including the legislature and the courts).

The governor is instructed to **reduce appropriations** that might exceed the spending limit if the legislature over-appropriates. He is also instructed to **NOT overspend** and after the fact, ask the legislature to increase appropriation levels.

Using Medicaid spending as an example, a governor could spend state money at a rate that would exceed its appropriation for the year and create a situation where the last two months of a fiscal year, no Medicaid reimbursements would be authorized. This could be considered a disaster and the: be excluded from the limit, however, there is a statutory provision requiring the agency to institute the optional services list to manage its spending. The options list has not been initiated in past years and it has been the accepted practice for the agency to request additional appropriation authorization mid-fiscal year.

The original language was:

(c) If appropriations for a fiscal year exceed the amount that may be appropriated under (a) and (b) of this section, the governor shall reduce expenditures by the executive branch for its operation and administration to the extent necessary to avoid spending more than the amount that may be appropriated under (a) and (b) of this section.

Can the Governor spend less than what is appropriated?

Yes, and the governor typically spends less than that which is appropriated for many of the state's smaller programs. There is no limit to how little of an appropriation the governor is required to actually spend.

What constitutes a disaster?

Hostile Action

Sec. 26.20.010. Policy and purpose.

(a) Because of the national emergency and the possibility of disasters or emergencies resulting from enemy attack, sabotage, or other hostile action, and in order to insure adequate preparations for disasters or emergencies, and generally to provide for the common defense, it is found and declared to be necessary. (abbreviated)

Disaster Emergencies

Sec. 26.23.020. The governor and disaster emergencies.

(a) The governor is responsible for meeting the dangers presented by disasters to the state and its people.

(c) If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster.

Federal Programs Available – Federal Development Fund

Section 44.33.285 Action by governor.

The governor may, upon recommendation of the commissioner of commerce and economic development, designate by proclamation an area as an area impacted by an economic disaster. When an area is so designated, the legislature may appropriate money for assistance grants and the governor may recommend in the governor's budget submission that capital projects planned for the area be accelerated and that new projects be funded for the area. The proclamation may provide that waivers of capital projects requirements, as authorized in AS 44.33.300, become effective only to the extent set out in the proclamation.

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DOCUMENT(S)
ARE
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APPENDIX C. STATE TAX AND EXPENDITURE LIMITS

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
ALASKA 1982[1] Constitutional Expenditure Legislative referendum	State appropriations	Yearly growth of appropriations may not exceed percentage increase in population and inflation	In the event of decreased revenues, an appropriation may be made from the Budget Reserve Fund.	None	None
ARIZONA 1978 Constitutional Expenditure Legislative Referendum	Appropriations of state tax revenues	Appropriations of state tax revenues shall not exceed 7.23 percent of state personal income	Requires two-thirds legislative approval for specific additional appropriations	Legislature shall provide for adjustments to limit if court order or legislative enactment transfers responsibility between state and local governments or between federal and state governments	None
CALIFORNIA 1979 Constitutional Expenditure Citizen Initiative	Appropriations of state tax revenues	Yearly growth in appropriations limit shall not exceed percentage increase in population and per capita personal income	In the event of an emergency, the appropriations limit may be exceeded provided increased expenditures are compensated for by reduced expenditures over three following years. Alternatively, the limit may be changed by voters but the change is operative for only four years	1) The appropriations limit shall be altered if program responsibility is transferred from one government entity to another, from government to private entity, or from funding through general revenues to funding through special revenues. 2) The state shall provide the funding when it requires local government to provide a program. 3) Appropriations required for purpose of complying with federal requirements are not under limit	One-half of all surplus revenues shall be returned to taxpayers by revision of tax rates or fee schedules within next two fiscal years; one-half shall be allocated to K-14 school districts.

1. Automatic vote for reconsideration of limit in 1986 continued the provision.

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
COLORADO 1991 Statutory Expenditure Legislative vote 1992 Constitutional Expenditure & Revenue Citizen Initiative	State general fund appropriations All state spending and tax increases	6 percent of prior year's appropriation Spending can only increase based on population growth and increase in CPI; no change in taxes or tax policy without voter approval; current spending limits cannot be weakened without voter approval	Legislative majority Any voter-approved increases; General Assembly can declare emergency by two-thirds vote and raise emergency taxes subject to voter approval	None Locals can reduce or end its subsidy for any state-mandated program except K-12 education; 90 days notice required and adjustment can occur in a maximum of three equal annual installments. Local taxes supporting these programs must be reduced accordingly	None Excess revenues must be refunded to the citizens
CONNECTICUT 1991-Statutory (resolution for a constitutional amendment)[2] 1992-Constitutional Expenditure Legislative vote-1991 Legislative referendum-1992	State appropriations (but excludes debt service, state grants to distressed municipalities, first year expenditures for federal mandates or court orders, and expenditures from the Budget Reserve Fund).	Appropriations shall not increase by more than the increase in personal income in the state (average of the annual increase for each of the preceding five years) or the increase in inflation (CPI-U, preceding 12 month period), whichever is greater	Governor can declare an emergency or the existence of extraordinary circumstances, plus approval by three-fifths of both House and Senate	None	1) Budget Reserve Fund (rainy-day fund) 2) Reduction of bonded indebtedness 3) Any purpose authorized by at least three-fifths of both House and Senate
DELAWARE 1978 Constitutional Expenditure Legislative referendum	State general fund appropriations	98 percent of estimated general fund revenue and prior year's unencumbered funds	Declaration of an emergency and three-fifths vote of each chamber	None	Goes into an accumulative cash balance and is available for appropriations in ensuing fiscal year
FLORIDA 1994 Constitutional Revenue Legislative referendum	All state revenues including taxes, fees, licenses and charges	Prior year's revenue plus growth, defined as a five year rolling average of personal income growth	Two-thirds vote of the Legislature	Legislature by statute can adjust the limit to reflect transfers in funding responsibilities between state and local governments	Excess revenues go to the budget stabilization fund. When the fund reaches statutory maximum, the excess is rebated to taxpayers

2. The constitutional amendment will not take effect until the legislature defines terms with a three-fifths vote

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
HAWAII 1978 Constitutional Expenditure Constitutional Convention	State general fund appropriations	General fund appropriations shall not exceed the average rate of growth of state personal income for three previous years.	Specific appropriations over the limit require two-thirds approval in both chambers	The state must share the cost of any new program or service increase required of local governments by the Legislature	If the state general fund balance in each of two succeeding years exceeds 5 percent of general fund revenues, the Legislature will provide for a tax refund
IDAHO 1980 Statutory Expenditure Legislative vote	State general fund appropriations (modified in 1994 to exclude one-time expenditures)	Appropriations shall not exceed five and one third percent of state personal income	No provision	Adjustments to limit shall be made if court order or legislative enactment transfers responsibility between state and local governments or between federal and state governments	No provision
IOWA 1992 Statutory Expenditure Legislative vote	State general fund appropriations	Appropriations can be 99 percent of adjusted general fund receipts	None	None	Excess goes to Cash Reserve Fund, then to the Rebuild Infrastructure Account, then to Economic Recovery Fund
LOUISIANA 1979 Statutory Revenue Legislative vote	State tax revenue	Tax revenue shall not exceed the ratio of FY 1978-79 tax revenue to 1977 state personal income. Expenditures for any given year shall not exceed anticipated state revenues for that year	Statute may be amended by vote of the Legislature	None	State tax revenue in excess of limit shall be deposited in the Tax Surplus Fund; appropriations from that fund may be made for paying tax refunds
1993 Constitutional Expenditure Legislative referendum	State general fund appropriations	State spending limited to 1992 appropriations plus per capita personal income growth	Two-thirds vote by the Legislature	None	Surplus may only be used to retire debt in advance of maturity
MASSACHUSETTS 1986 Statutory Revenue Legislative vote	State revenue	General fund balance may not exceed one-half of 1 percent of the year's tax revenue	Statute may be amended by vote of the legislature	Vote of legislature	Excess revenues transferred to a budget stabilization fund which is only allowed to grow to 5 percent of the state tax revenue, if the fund grows by more, the excess goes back to the taxpayers as an income tax credit Proportional personal

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
MASSACHUSETTS, con.t 1986 Statutory Revenue Initiative petition	State revenue	Revenues limited to the average growth of wages and salaries of the previous three years	Statute may be amended by vote of the legislature	Vote of legislature	Income tax credit
MICHIGAN 1978 Constitutional Revenue Citizen initiative	All state revenues less federal aid	For any fiscal year, state revenue may not exceed 9.49 percent of total personal income for the year prior	Governor must first specify an emergency; then the Legislature must concur by two-thirds vote in each chamber	1) Limit may be adjusted if program responsibility is transferred from one level of government to another by means of a constitutional amendment. 2) State is prohibited from reducing current proportion of local services financed through state aid. 3) No new program shall be required of local governments unless funded by state. 4) The proportion of total state spending paid to all units of local government as a group shall not be reduced below proportion for FY78-79	Revenues exceeding limit by 1 percent or more shall be used for tax refunds set in proportion to income tax liability. Excess less than 1 percent may be transferred to the State Budget Stability Fund
MISSISSIPPI 1992 Statutory Expenditure Legislative vote	Budget recommendations and appropriations	Budget and appropriations are limited to 98 percent of projected revenues	None	None	One-half of year-end surplus remains in the general fund, and one-half goes into a working cash/stabilization reserve fund up to the 7.5 percent ceiling, then remainder goes into a special education fund
MISSOURI 1980 Constitutional Revenue Citizen initiative	Total state revenue	Revenue shall not exceed the ratio of FY 1980-81 state revenue to 1979 state personal income, multiplied by the greater of state personal income in any calendar year or the average state personal income over the previous three calendar	Governor must first specify an emergency; then the legislature must concur by two-thirds vote in each chamber	1) Limit may be adjusted if program responsibility is transferred from one level of government to another. 2) State is prohibited from reducing current proportion of local services financed through state aid. 3) No new program shall be	Revenues exceeding limit by 1 percent or more shall be used for tax refunds set in proportion to income tax liability. Excess less than 1 percent may be transferred to the general revenue fund

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
MISSOURI, cont. 1996 Constitutional Revenue Citizen Initiative	Total state revenue	years Voter approval required for any tax or fee increase that will produce revenues greater than: 1) $50 million adjusted annually by the percentage change in state personal income for the second previous fiscal year, or 2) one percent of the state revenues for the second fiscal year prior to the legislature's action, whichever is less	Governor must first specify an emergency; then the legislature must concur by two-thirds vote in each chamber	required of local governments unless funded by state. None	 Does not affect 1980 amendment–same as above
MONTANA 1981 Statutory Expenditure Legislative vote	State appropriations	State biennial appropriations shall not exceed state appropriations for the preceding biennium plus the product of preceding biennial appropriations and the growth percentage. The growth percentage is the difference between average state personal income for three calendar years immediately preceding the next biennium and the average state personal income for the three calendar years immediately preceding the current biennium	Governor must declare an emergency. Legislature must then approve specific additional expenditures by two-thirds vote of each chamber	None	No provision
NEVADA 1979 Statutory Expenditure Non-binding Legislative Vote	Governor's proposed general fund expenditures	State expenditures are tied to population growth and inflation using the 1975-76 biennium as the base	Not applicable because non-binding	None	No provision

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses
NEW JERSEY 1990 Statutory Expenditure Legislative vote	General fund state appropriations less exemptions for debt service, state aid, grants-in-aid and capital construction	Appropriations shall not exceed the average prior three years of state per capita annual income	Two-thirds vote of the Legislature	Adjustment to limit shall be made if program responsibility is transferred between state and local governments	No provision, but the state has a rainy day fund
NORTH CAROLINA 1991 Statutory Expenditure Legislative vote	State appropriations	Fiscal year operating budget shall not be greater than 7 percent of the projected total state personal income for that fiscal year	Limit may be exceeded to the extent that Medicaid, prison operations or state health insurance increases exceed increases in state personal income	None	Revert to general fund credit balance
OKLAHOMA 1985 Constitutional Expenditure Legislative referendum	Appropriated revenues	1) 12 percent yearly increase (adjusted for inflation) 2) 95 percent of certified revenue	None	None	Revenue to general fund in excess of estimate (up to 10 percent) shall be deposited in a rainy day fund
OREGON 1979 Statutory Expenditure Legislative vote	State appropriations	The rate of growth of appropriations in each biennium shall not exceed rate of growth of state personal income in the two prior calendar years	Legislative majority	Adjustment to limit shall be made if program funding is transferred from general fund to non-general fund sources or vice-versa	Revenue exceeding close of session revenue forecast by 2 percent or more shall be used for tax refunds proportional to income tax liability
RHODE ISLAND 1992 Constitutional Expenditure Legislative referendum	State general fund appropriations	98 percent of estimated general fund revenue and prior year's unencumbered funds	None	None	2 percent must be put into rainy day fund
SOUTH CAROLINA 1980, 1984 Constitutional Expenditure Legislative Referendum	State appropriations approved by General Assembly	Yearly growth in state appropriations shall not exceed average growth of personal income over three preceding years or 9.5 percent of total state personal income, whichever is greater. Also, the number of state employees is tied to state population	Limit may be exceeded for one year by a two-thirds vote of the legislature if it first declares a financial emergency. Also, every five years the legislature can review the composition of the limit	None	Excess revenues may be spent to match federal programs, for debt purposes, tax relief, or transferred to reserve fund

STATE Year of Adoption Type of Limit Method of Approval	Limit Applies To	The Limit Is	Provisions for Waiver	Provisions in the Case of Transfer of Responsibility for Government Programs	Treatment of Surpluses'
TENNESSEE 1978 Constitutional Expenditure Constitutional Convention	Appropriations of state tax revenue	Growth in state appropriations shall not exceed growth in state personal income	Specific additional amount may be approved by majority vote of the legislature	State must share in cost if it increases expenditure requirements of local government	No provision
TEXAS 1978 Constitutional Expenditure Legislative referendum	Appropriations of state tax revenues not dedicated by the state constitution	Growth of biennial appropriations shall not exceed rate of growth of state personal income	Specific additional amount may be approved by majority vote of the Legislature if it first adopts a resolution that an emergency exists	None	No provision
UTAH 1989 Statutory Expenditure Legislative vote	State appropriations	Yearly growth in appropriations tied to population growth and inflation	Emergency must be declared by governor and confirmed by more than two-thirds of both houses of the Legislature	1) Adjustment to limit shall be made if program responsibility is transferred between state and local governments 2) Adjustment to limit shall be made if program funding is transferred from general fund to non-general fund sources or vice-versa	No provision
WASHINGTON 1993 Statutory Expenditure Citizen initiative	State expenditures	State expenditures are tied to a three year rolling average of inflation and population growth	An emergency must be declared and approved with two-thirds vote of the Legislature. Revenue increases need two-thirds legislative approval if within expenditure limit, voter approval needed to exceed limit	Prohibits state from imposing new mandates on local governments unless fully reimbursed	Excess revenue goes into Emergency Reserve Fund; if fund exceeds five percent of general fund revenue, the additional surplus is placed in the Education Construction Fund

Source: NCSL survey of legislative fiscal officers, April 1996

Spending Limit Escalation Factors and Calculation Comparison

Calendar Year		Average Annual Personal Income	Personal Income % change	Average Monthly Employment	Employment % change	Annual Payroll	Payroll % change	1-Jul Population	Population % change	CPIU Anchorage	Inflation % change
	81	6,902		185,387		4,759,723,567		434,300		92.4	
	82	8,263	20%	199,845	8%	5,520,124,247	16%	464,300	7%	97.4	5%
	83	9,302	13%	212,832	6%	6,075,746,330	10%	499,100	7%	99.2	2%
	84	9,958	7%	222,498	5%	6,360,195,845	5%	524,000	5%	103.3	4%
	85	10,756	8%	228,076	3%	6,484,283,718	2%	543,900	4%	105.8	2%
	86	10,722	0%	218,729	-4%	6,154,855,455	-5%	550,700	1%	107.8	2%
	87	10,427	-3%	207,998	-5%	5,759,858,788	-6%	541,300	-2%	108.2	0%
	88	10,776	3%	212,080	2%	5,879,980,794	2%	535,000	-1%	108.6	0%
	89	11,779	9%	225,028	6%	6,620,359,500	13%	538,900	1%	111.7	3%
	90	12,567	7%	236,227	5%	7,004,096,991	6%	553,171	3%	118.6	6%
	91	13,243	5%	241,024	2%	7,347,053,592	5%	569,054	3%	124.0	5%
	92	14,039	6%	245,845	2%	7,723,072,327	5%	586,722	3%	128.2	3%
	93	14,791	5%	251,216	2%	8,017,637,481	4%	596,906	2%	132.2	3%
	94	15,168	3%	256,829	2%	8,288,064,209	3%	600,622	1%	135.0	2%
	95	15,514	2%	259,771	1%	8,387,406,337	1%	601,581	0%	138.9	3%
	96	15,763	2%	261,484	1%	8,389,994,484	0%	605,212	1%	142.7	3%
	97	16,488	5%	266,112	2%	8,721,665,986	4%	609,655	1%	144.8	1%
	98	17,138	4%	271,907	2%	9,108,277,123	4%	617,082	1%	146.9	1%
	99	17,600	3%	274,570	1%	9,201,169,498	1%	622,000	1%	148.4	1%
	2000	18,806	7%	280,664	2%	9,743,507,197	6%	627,697	1%	150.9	2%
	2001	19,661	5%	287,941	3%	10,288,563,168	6%	633,630	1%	155.2	3%
	2002	20,467	4%	292,237	1%	10,726,560,790	4%	643,786	2%	158.2	2%

Sources: Personal Income - U.S. Bureau of Economic Analysis (BEA); Employment, Payroll, Population - AK, DOL, Research and Analysis;
Inflation - U.S. Bureau of Labor Statistics (BLS).

*Note that FY 04 is the base year for calculating the limit but if it were in effect the allowable change in spending would apply to the FY 05 budget, which is unknown at this time. This projection is an attempt to show the relative change between proposals. Also the more spending categories removed from the limit, the higher the potential budget growth.

PI Average	5.166%
Pop Average	1.155%
Infl Average	2.156%

HJR

22

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 10, 2003 **FURTHER REFERRALS:**

Date of Committee Action: MAY 12, 2003

The RULES Committee considered: **HJR 22**

HOUSE JOINT RESOLUTION NO. 22 **PATRIOT ACT AND DEFENDING CIVIL LIBERTIES**

Relating to the USA PATRIOT Act and to defending the Bill of Rights, the Constitution of the State of Alaska, and civil liberties.

Recommends it be replaced with [ ] HCS *or* [✓] CS for HJR 22 (RLS)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	McGuire	✓			
	Berkowitz	✓			
	Foster	✓			
	Coghill	—			
	Morgan	✓			
	Kerttula	✓			
Chair:	Rokeberg			✓	
Chair:					

23-LS0924\I
Cook
5/12/03

CS FOR HOUSE JOINT RESOLUTION NO. 22(RLS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES GUTTENBERG, Coghill, Crawford, Kerttula, Holm, McGuire

A RESOLUTION

Relating to the USA PATRIOT Act, the Bill of Rights, the Constitution of the State of Alaska, and the civil liberties, peace, and security of the citizens of our country.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the State of Alaska recognizes the Constitution of the United States as our charter of liberty, and that the Bill of Rights enshrines the fundamental and inalienable rights of Americans, including the freedoms of religion, speech, assembly, and privacy; and

WHEREAS each of Alaska's duly elected public servants has sworn to defend and uphold the United States Constitution and the Constitution of the State of Alaska; and

WHEREAS the State of Alaska denounces and condemns all acts of terrorism, wherever occurring; and

WHEREAS attacks against Americans such as those that occurred on September 11, 2001, have necessitated the crafting of effective laws to protect the public from terrorist attacks; and

WHEREAS any new security measures of federal, state, and local governments should be carefully designed and employed to enhance public safety without infringing on the civil liberties and rights of innocent citizens of the State of Alaska and the nations; and

WHEREAS certain provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, also known as the USA PATRIOT Act, allow the federal government more liberally to detain and investigate citizens and engage in surveillance activities that may violate or offend the rights and liberties guaranteed by our state and federal constitutions;

BE IT RESOLVED that the Alaska State Legislature supports the government of the United States of America in its campaign against terrorism, and affirms its commitment that the campaign not be waged at the expense of essential civil rights and liberties of citizens of this country contained in the United States Constitution and the Bill of Rights; and be it

FURTHER RESOLVED that it is the policy of the State of Alaska to oppose any portion of the USA PATRIOT Act that would violate the rights and liberties guaranteed equally under the state and federal constitutions; and be it

FURTHER RESOLVED that, in accordance with Alaska state policy, an agency or instrumentality of the State of Alaska, in the absence of reasonable suspicion of criminal activity under Alaska State law, may not

(1) initiate, participate in, or assist or cooperate with an inquiry, investigation, surveillance, or detention;

(2) record, file, or share intelligence information concerning a person or organization, including library lending and research records, book and video store sales and rental records, medical records, financial records, student records, and other personal data, even if authorized under the USA PATRIOT Act;

(3) retain such intelligence information; the state Attorney General shall review the intelligence information currently held by the state for its legality and appropriateness under the United States and Alaska Constitutions and permanently dispose of it if there is no reasonable suspicion of criminal activity; and be it

FURTHER RESOLVED that an agency or instrumentality of the state may not,

(1) use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government;

(2) collect or maintain information about the political, religious, or social views, associations, or activities of any individual, group, association, organization, corporation, business, or partnership, unless the information directly relates to an

investigation of criminal activities and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct;

(3) engage in racial profiling; law enforcement agencies may not use race, religion, ethnicity, or national origin as factors in selecting individuals to subject to investigatory activities except when seeking to apprehend a specific suspect whose race, religion, ethnicity, or national origin is part of the description of the suspect; and be it;

FURTHER RESOLVED that the Alaska State Legislature implores the United States Congress to correct provisions in the USA PATRIOT Act and other measures that infringe on civil liberties, and opposes any pending and future federal legislation to the extent that it infringes on Americans' civil rights and liberties.

COPIES of this resolution shall be sent to the Honorable George W. Bush, President of the United States; the Honorable John Ashcroft, Attorney General of the United States; the Honorable Frank Murkowski, Governor of Alaska; and to the Honorable Ted Stevens and the Honorable Lisa Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

Subject: re CS HJR 22
Date: Sun, 11 May 2003 12:19:34 -0800
From: "Jennifer Rudinger" <akclu@alaska.net>
To: <Vanessa_Tondini@legis.state.ak.us>, <Janet_Seitz@legis.state.ak.us>

Janet and Vanessa,

Regarding CS HJR 22, both Rep. Coghill and Rep. Guttenberg have agreed upon the language in the attached document we sent to them Friday night. I just spoke to Reneva Moss in Rep. Coghill's office (right after speaking with you, Vanessa) and she confirms that both sponsors agree. I am just copying the two of you on this letter, FYI.

This is so exciting!!!! A very broad left-right coalition is eager to see this resolution pass. Thank you both for your efforts in helping to move it to the floor tomorrow. Feel free to share this attachment with Reps. Rokeberg and McGuire, but since Coghill and Guttenberg agree, this should be a no-brainer.

If you have any questions or wish to discuss this with me further, feel free to call my cell phone at 440-3586.

Sincerely,

Jennifer Rudinger, Executive Director
Alaska Civil Liberties Union

CS HJR 22 proposed amendments and cover letter.doc	**Name:** CS HJR 22 proposed amendments and cover letter.doc **Type:** WINWORD File (application/msword) **Encoding:** base64 **Download Status:** Not downloaded with message

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union
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Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

VIA FACSIMILE

May 9, 2003

Representative John Coghill
State Capitol
Juneau, AK 99801-1182

Dear Rep. Coghill:

As you know, I was listening in offline to the House Judiciary Committee's hearing on HJR 22 today to testify briefly in support of the bipartisan efforts of you and Representative Guttenberg to defend Alaskans' cherished civil liberties from unwarranted government infringement. I have been inspired this week to see how the two of you have worked together to defend the Bill of Rights, and I hope that your joint efforts serve as a model for your fellow legislators as we work to pass this groundbreaking state resolution.

Further, I understand your concerns that some of the provisions in the initial committee substitute were too general in barring certain types of activity, and I thank you for raising these legitimate concerns. However, I do want to convey some concerns that we have about the CS that moved out of House Judiciary today. While clearly well intentioned, close legal scrutiny of the specific language of the adopted amendment reveals that the CS may now endanger the very civil rights that the resolution aims to protect and therefore may pose some serious legal problems for the State. As moved out of Judiciary today, the CS now permits racial profiling (profiling based *solely* on race) under certain circumstances. Racial profiling is illegal and should not be permitted under any circumstances.

We agree with you that law enforcement should be able to use race or ethnicity as a factor in an investigation if that is part of a description of a criminal suspect. Therefore, we suggest the following amendments (see attached) to distinguish between "racial profiling," which is always illegal, and using race as a factor in an investigation when it is part of the description of a criminal suspect.

A broad Right-Left coalition has formed in support of a strongly worded, binding resolution to empower Rep. Young to fix the USA PATRIOT Act and to make clear to the federal government that the State of Alaska will not surrender A' :ans' civil liberties for the sake of measures that are not necessary to keep us safe from terrorism. But this coalition and the grassroots support that has been flooding in behind your bipartisan efforts would not want to see the Legislature inadvertently authorize profiling based

solely on race, ethnicity, religion or national origin when there is no reason to suspect that the subjects are involved in any kind of unlawful activity.

We have also proposed language to address your concerns about the use of people's political, religious or social affiliations if these affiliations are relevant to a criminal investigation or a suspected terrorist cell. We believe that our proposed language for (2) and (3) at the bottom of Page 2 and top of Page 3 of the CS address your concerns more succinctly so that it is unnecessary to add the vague, subjective qualifier "without compelling justification" at Page 2, lines 26-27.

I am very eager to work with you to find language that satisfactorily addresses your concerns and that is also legally sound. I am also quite confident that we can generate broad bipartisan support for the attached amendments so as to move this quickly on the floor of the House. I will keep my cell phone on all weekend and all next week, and that number is (907) 440-3586. Please feel free to contact me to discuss this further. We can – and must – remain both safe and free.

Sincerely,

Jennifer I. Rudinger, Esq.
Executive Director

CC: Representative David Guttenberg

Proposed Amendment to CS HJR 22:

Page 2, lines 26 - 27: Delete "without compelling justification"

Page 2, lines 29 - 31: Delete all and insert:

"(2) collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct;

Page 3, line 1: Delete all and insert:

"(3) engage in racial profiling. Law enforcement shall not utilize race, religion, ethnicity, or national origin as a factor in selecting which individuals to subject to investigatory activities except when seeking to apprehend a specific suspect whose race, religion, ethnicity or national origin is part of the description of the suspect; and be it"

b (7)

HOUSE COMMITTEE REPORT

5.10.03

Date Referred to Committee: May 6, 2003

FURTHER REFERRALS: Rules

Date of Committee Action: May 9, 2003

The JUDICIARY Committee considered: HJR 22

HOUSE JOINT RESOLUTION NO. 22 — **PATRIOT ACT AND DEFENDING CIVIL LIBERTIES**

Relating to the USA PATRIOT Act and to defending the Bill of Rights, the Constitution of the State of Alaska, and civil liberties.

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HJR 22 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	1			✓

Signing with recommendations	Printed Last Name	DR ~~DR~~ 7	DNP	NR	AM
	SAMUELS	✓			
	Holm	✓			
	Gara	✓			
	Ogg	✓			
	Gruenberg	—			
Tom Anderson	ANDERSON	X			
Chair:	McGuire	✓			
Chair:					

Proposed Amendment to CS HJR 22:

Page 2, line 26: Delete "without compelling justification"

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Page 3, line 1: Delete all and insert:

"(3) engage in racial profiling. Law enforcement shall not utilize race, religion, ethnicity, or national origin as a factor in selecting which individuals to subject to investigatory activities except when seeking to apprehend a specific suspect whose race, religion, ethnicity or national origin is part of the description of the suspect; and be it"

5/10/03

a Rules CS with above amendment has been requested but not yet received.

Janet
1:11 pm

Session:
State Capitol, Room 13
Juneau, AK 99801
(907) 465-4457 Office
(907) 465-3519 Fax
(800) 928-4457 Toll Free

Alaska State Legislature
Representative David Guttenberg

Interim:
119 N. Cushman
Suite 211
Fairbanks, AK 99701
(907) 456-8172
(907)451-9293 Fax

District 8

Sponsor Statement
HJR 22 Patriot Act and Defending Civil Liberties

When Rep. Don Young (R-AK) was asked about his vote in favor of the hastily enacted USA PATRIOT Act, he told the Alaska Public Radio Network, "We didn't follow it through; we didn't study it. I say it's the worst piece of legislation we've ever passed."

Many share Rep. Young's concern about this domestic security bill passed by Congress in the wake of the September 11 terrorist attacks. Almost 100 communities across the nation including Fairbanks, Juneau, North Pole, and Gustavus, and the state of Hawaii have passed resolutions stating that the Act violates fundamental rights and liberties guaranteed under the United States Constitution.

The State of Alaska has a proud history of respecting the right to privacy and individual liberties as reflected in the Alaska and U.S. Constitutions. This resolution states that efforts to fight terrorism must not be waged at the expense of the civil rights and liberties of the people of the State of Alaska and the United States.

The resolution affirms the state's strong opposition to terrorism but raises concerns about provisions of the USA Patriot Act that expand federal authority to detain and investigate and engage in the electronic surveillance of citizens and non-citizens alike.

The resolution states that absent any probable cause of criminal activity, it is the policy of the State of Alaska to forbid participation or cooperation with such investigations, surveillance, or detention; the recording, sharing, and retention of intelligence information such as library records; book and video sales or rental records; medical, financial, and student records, and other personal data; and profiling based on race, ethnicity, citizenship, religion, or political views.

The resolution also calls upon Alaska's Congressional delegation to work to correct provisions of the USA Patriot Act and other measures that infringe on civil liberties.

Any infringement of the constitutionally guaranteed rights of any person, under the color of law, is an abuse of power, a breach of the public trust, and a violation of civil rights. As founding father Benjamin Franklin noted, "Any society that would give up a little liberty to gain a little security will deserve neither and lose both."

Anderson • Cantwell • Chena • Denali Park • Ester • Geist • Goldstream • Healy • Pike
University Campus • University Hills • University West
<Representative_David_Guttenberg@legis.state.ak.us>

ALASKA STATE HOUSE OF REPRESENTATIVES

Interim Address:
3340 Badger Road, Suite 290
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4721

Session Contact:
(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 204

REPRESENTATIVE JOHN COGHILL

HJR 23 PATRIOT ACT RESOLUTION
SPONSOR STATEMENT

The USA Patriot Act Resolution creates new crimes, new penalties, and new procedural efficiencies for use against domestic terrorists. The open question is, "can we maintain our liberty while expanding government powers in combating terrorism?"

The Declaration of Independence, United States Constitution, and The Alaska State Constitution all in unison make up our form of government and describe the limitation of governmental powers while protecting individual liberties.

Each generation has the charge to know and protect this most honorable form of government structure while enjoying the freedoms it affords. We must be ever vigilant in self-government and cautious of a government that would rule rather than serve us, a free people.

The events of 9-11 jolted the American people and propelled us to action. President Bush said these events "woke a sleeping giant" and started the "war on terrorism" aimed at defending the principles of freedom while insuring the safety of Americans.

I fear that many measures of homeland security instituted in the Patriot Act take a direct shot at the very foundations of our society. The need to search for criminals may give way to violations of our civil protections under the Bill of Rights. The powers of government under this Patriot Act cause me grave concern as they expand the government powers to inspect a free persons movement, personal accounts, communications or personal affects with a very low level of due process.

James Madison, at the Virginia convention to ratify the Constitution said "There are more instances in the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

HJR23 calls our leaders to caution with regard to this Patriot Act and urges them to apply the Constitutional principles that are meant to "secure the blessings of liberty" and not to erode the public confidence in our government through abuses of power.

HJR23 includes the preamble to our Constitution and a quote from Benjamin Franklin that tie liberty to national defense and demonstrates that our national security was also an issue of concern 230 years ago when our Constitution was written.

HJR23 voices the Alaska State Legislatures support in the campaign against terrorism. It affirms its commitment to the foundational institutions that protect our freedom and liberty.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HJR 22
(H) Publish Date: 5/6/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "Relating to the USA PATRIOT Act and to defending the Bill of Rights, the Constitution of the State . . ."
BRU None
Component
Sponsor Representative Guttenberg
Requester House State Affairs Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Passage of this resolution will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 5/5/03 5:34 PM
Approved by: Joan M. Kasson for Gregg D. Renkes, Attorney General
Date 5/5/2003
Agency Department of Law

(Revised 9/2002 OMB)

Fairbanks Daily News-Miner

Callers testify against Patriot Act

By TOM MORAN

Wednesday, May 07, 2003 - News-Miner Juneau Bureau

JUNEAU--The Patriot Act is hardly patriotic, according to the many callers who testified before the House State Affairs Committee on Tuesday morning.

The committee voted to move a pair of state-level resolutions expressing concern at the implications of the act, an antiterrorism measure passed by Congress shortly after the Sept. 11 attacks that dramatically increased federal search and surveillance powers, after hearing testimony from 26 people--25 of whom opposed the act. Opponents contend that stipulations of the act infringe on civil liberties guaranteed in the Bill of Rights of the U.S. Constitution.

"Any time the government is proposing measures that potentially infringe on our civil liberties in the name of security, there are some questions that we, the people, and our elected representatives should ask," said Alaska ACLU executive director Jennifer Rudinger.

The committee was considering a pair of similar nonbinding resolutions expressing concern about the act. House Joint Resolution 22, introduced by Rep. David Guttenberg, D-Fairbanks, states that the Patriot Act violates civil rights, reaffirms that it is not a policy of the state of Alaska to participate in many of the measures called for by the act, and calls on Alaska's congressional delegation to work to correct the act.

House Joint Resolution 23, introduced by House Majority Leader John Coghill, R-North Pole, isn't as far-reaching: It calls on all government officials to ensure that the government does not infringe on civil rights.

Coghill said he would be willing to work with Guttenberg to come up with the best document to meet their needs. "I think both of us are on the same track here," he said. "I'm open to the discussion of how we can move things forward together."

Coghill said he would like to see some form of Patriot Act resolution passed during this legislative session, which ends May 21.

Many of the 26 speakers and callers at Monday's meeting said they would support either Guttenberg's version or an amalgamation of the two resolutions.

Of the callers, only Graham Storey of Nome spoke against the resolutions, arguing that the Patriot Act merely restores federal authority to where it was 30 years ago.

"Quite frankly, I can't believe responsible legislators would advocate the civil disobedience of not following federal legislation which is entirely constitutional," he said.

His comments brought a gasp from others at the meeting, many of whom reacted to the act with indignation, anger or even tears.

"I get very teary-eyed over this," said Janet Kussart of Juneau. "If I'm frightened about anything, it's our own government and what they can do with this."

Among its provisions, the Patriot Act allows the FBI to investigate American citizens without probable cause, lets noncitizens be jailed based on mere suspicion, expands federal powers of electronic, phone and other surveillance, and gives the government access to personal records reaching down to books a person has checked out of the library.

Many speakers cited the origin of the act, which was hastily passed by Congress the month after Sept. 11 with little public input and which increased in size shortly before its passage. Some congressmen admitted they didn't read the act before voting on its passage.

Eleven of the callers were from the Fairbanks area, where there is vocal opposition to the Patriot Act. The Fairbanks and North Pole city councils have passed resolutions questioning it, and the Fairbanks North Star Borough Assembly narrowly defeated a similar measure. Frank Turney of Fairbanks told the committee Tuesday that he supports American troops but can't support the act.

"The Patriot Act is not the intent of our founding fathers," he said. "I believe it takes more than a soldier to protect our freedoms."

After the conclusion of testimony, the committee agreed to move both resolutions, which now head to the House Judiciary Committee. A Senate resolution identical to Guttenberg's introduced by Senate Minority Leader Johnny Ellis, D-Anchorage, has yet to receive a committee hearing.

If Alaska passes a resolution, it would become the second state to sponsor such a measure; Hawaii passed one last month. Almost 100 communities nationwide, including four in Alaska, have also passed measures expressing concern about the act.

Reporter Tom Moran can be reached at tmoran@newsminer.com or (907)463-4893.

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April 3, 2003

Vol. 18, No. 01
January 14, 2002
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More on Terrorism
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The Un-American Patriot Act

by Steve Bonta

The new USA Patriot Act, enacted in response to the September 11th terrorist attacks, could pose more of a threat to personal liberty than to terrorists.

Some weeks back — no one remembers exactly when — an early draft of the USA Patriot bill containing a section entitled "Suspension of the Writ of Habeas Corpus" showed up at the House Judiciary Committee. *Newsweek* 's Jonathan Alter wrote that the secret draft — sent by Attorney General John Ashcroft's office — "dumbfounded" members of Congress who read it. Representative James Sensenbrenner (R-Wis.), chairman of the House Judiciary Committee, promptly struck out the provision.

Although the Justice Department did not return repeated phone calls, Jeff Lungren of the House Judiciary Committee press office assured The New American that the draft in question was one of many very early versions of the bill, and that the provision was never given serious consideration. Nevertheless, it is disquieting to know that someone in official Washington might be seriously thinking about curtailing the ancient protection against arbitrary and unjust imprisonment. The final version of the USA Patriot Act (H.R. 3162), which President Bush recently signed into law, does not contemplate such extreme measures, but does expand federal government powers of surveillance, search, and arrest, and sets potentially harmful precedents for future encroachments

and sets potentially harmful precedents for future encroachments on personal liberty.

Bombastically named the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," H.R. 3162 is a confusing compilation of broad new surveillance, search, and seizure powers, some of which — despite Mr. Ashcroft's claims to the contrary — may be unconstitutional.

The new law greatly expands the legal use of so-called "black-bag" searches. Law-enforcement authorities using this secretive procedure are not required to notify the subject of an investigation until after the search has taken place, if authorities can claim that such a notification might hamper the investigation by allowing the suspect to tip off associates. In the past, suspects were usually notified when law enforcement conducted a search, although occasional exceptions were allowed for searches of electronic data. The new bill, however, has the effect of expanding to any criminal case the authority to conduct secret searches.

"Roving wiretaps" (or PR/TT warrants) allowing investigators to tap multiple phones used by a single suspect, as well as subpoenas for electronic records, may now be carried out nationwide based on a single order. Before H.R. 3162, such warrants could only be executed within the jurisdiction of the judge issuing the order.

Secret searches and warrants with nationwide, extra-jurisdictional force are quite possibly unconstitutional, since the Fourth Amendment requires warrants to be issued "upon probable cause ... particularly describing the place to be searched, and the persons or things to be seized."

H.R. 3162 also allows the CIA to access foreign intelligence information obtained by domestic grand juries, as well as from wiretaps and criminal investigations by the FBI and other law-enforcement agencies. This will have the unsavory consequence of blurring the line between law-enforcement and foreign intelligence gathering, and will effectively put the CIA into the business of spying on American citizens.

Overall, H.R. 3162 limits judicial oversight in the gathering of evidence, diminishes the distinction between the gathering of foreign intelligence and domestic law enforcement, and allows many of these provisions to be applied, not just against agents of foreign governments or against "terrorists" (which are very broadly defined), but against citizens of any stripe who might be deemed a threat.

Despite these dangerous new powers, only one senator, Russ Feingold (D-Wis.), voted against the bill, claiming that H.R. 3162 "does not strike the right balance between empowering law enforcement and protecting civil liberties." The House was more circumspect, with 66 members voting against the bill. One of the representatives who opposed the bill, Ron Paul (R-Texas), expressed grave concerns over many of its provisions:

> I do not believe that our Constitution permits federal agents to monitor phones, mail, or computers without a warrant.... History demonstrates that the powers we give the federal government today will remain in place indefinitely. How comfortable are you that future Presidents won't abuse those powers?... The bottom line is that every American should be very concerned about the unintended consequences of policies promoted to fight an unending, amorphous battle against terrorism.

Yet president Bush praised H.R. 3162 as giving "intelligence and law enforcement officials new tools to fight a present danger," and promised to "enforce this law with all the urgency of a nation at war."

The USA Patriot Act, unfortunately, appears to be but the opening salvo of a multi-front assault on individual liberties and on the checks and balances undergirding our federalist system. According to Congressman Paul, "Every 20th century crisis ... led to rapid expansions of the federal government. The cycle is always the same, with temporary crises used to justify permanent new laws, agencies, and programs. The cycle is [now] repeating itself."

Order This Issue

Introduced by: Council Member Gilbert
Date: January 6, 2003

RESOLUTION NO. 4036, As Amended

A RESOLUTION TO DEFEND THE BILL OF RIGHTS AND CIVIL LIBERTIES.

WHEREAS, the City of Fairbanks recognizes the Constitution of the United States of America to be the supreme law of the land, which all public servants are sworn to uphold; and

WHEREAS, the City of Fairbanks has a long and proud tradition of upholding the free exercise and enjoyment of the inalienable rights granted to all persons by the Universal Declaration of Human Rights and the Constitution of the United States of America; and

WHEREAS, the City of Fairbanks greatly benefits from the many contributions of its highly diverse population, which includes citizens from around the world, and is vital to our city's unique character; and

WHEREAS, the City of Fairbanks affirms its strong opposition to terrorism, but also affirms that any efforts to end terrorism not be waged at the expense of essential civil rights and liberties of the people of Fairbanks, the United States and the World; and

WHEREAS, the provisions of the USA Patriot Act expands the authority of the federal government to detain and investigate citizens and non-citizens and engage in electronic surveillance of citizens and non-citizens may threaten civil rights and liberties guaranteed under the United States Constitution; and

WHEREAS, the City of Fairbanks recognizes that an infringement of the constitutionally guaranteed rights of any person, under the color of law, is an abuse of power, a breach of the public trust, a misappropriation of public resources, a violation of civil rights and is beyond the scope of governmental authority.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAIRBANKS remains firmly committed to the protection of civil rights and civil liberties for all people. The City of

Fairbanks will completely avoid discrimination in every function of city government, and vigorously uphold the constitutionally protected rights of all persons to peacefully protest and express their political views without any form of governmental interference.

IT IS HEREBY FURTHER RESOLVED that the City of Fairbanks joins communities across the nation in expressing concern that the USA Patriot Act threatens civil rights and liberties guaranteed under the United States Constitution.

IT IS HEREBY FURTHER RESOLVED, and is the policy of the City of Fairbanks, to forbid in the absence of probable cause of criminal activity:

1. any initiation of, participation in, assistance or cooperation with any inquiry, investigation, surveillance or detention; and

2. the recording, filing and sharing of any intelligence information concerning any person or organization, even if authorized by federal law enforcement, acting under new powers granted by the USA Patriot Act or Executive Orders. This includes collection and review of library lending and research records, as well as book and video store sales and/or rental records; and

3. the retention of intelligence information. Information that is currently held shall be thoroughly and carefully reviewed by the City Attorney or other appropriate City official to be designated by the Mayor, for its legality and appropriateness, using the United States and Alaska Constitutions. Any information that was collected is permanently disposed of if there is no probable cause of criminal activity; and

4. enforcement of immigration matters, which are entirely the responsibility of the Immigration and Naturalization Service. No city service will be denied on the basis of citizenship; and

5. profiling based on race, ethnicity, citizenship, religion, or political values.

PASSED AND APPROVED this 6th day of January, 2003.

Steve M. Thompson, Mayor

AYES: 5
NAYES: 0
ABSTAIN:
ABSENT: 1

ATTEST:

Carol L. Colp, City Clerk

APPROVED AS TO FORM:

Herbert P. Kuss, City Attorney

American Civil Liberties Union

www.aclu.org

URL: http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11893&c=207

Gustavus, AK Community Resolution
February 24, 2003

A RESOLUTION TO DEFEND THE BILL OF RIGHTS AND CIVIL LIBERTIES

WHEREAS, the Gustavus Community Association (GCA) recognizes the Constitution of the United States of America to be the supreme law of the land, which all public servants are sworn to uphold; and

WHEREAS, GCA has a long and proud tradition of upholding the free exercise and enjoyment of the inaleienable rights granted to all persons by the Constitution of the United States of America; and

WHEREAS, GCA greatly benefits from the many contributions of its diverse population, which includes citizens from around the world, and is vital to our community's unique character; and

WHEREAS, GCA affirms its strong opposition to terrorism, but also affirms that any efforts to end terrorism not be waged at the expense of essential civil rights and liberties of the people of Gustavus, the United States, and the World; and

WHEREAS, the provisions of the USA PATRIOT Act expands the authority of the federal government to detain and investigate citizens and non-citizens may threaten civil rights and liberties guaranteed under the United States Constitution; and

WHEREAS, GCA recognizes that an infringement of the constitutionally guaranteed rights of any person, under color of law, is an abuse of power, a breach of the public trust, a misappropriation of public resources, a violation of civil rights and is beyond the scope of governmental authority.

NOW, THEREFORE, BE IT RESOLVED THAT THE GUSTAVUS COMMUNITY ASSOCIATION remains firmly committed to the protection of civil rights and civil liberties for all people. GCA will completely avoid discrimination in every function of community government, and vigorously uphold the constitutionally protected rights of all persons to peacefully protest and express their political views without any form of governmental interference.

IT IS HEREBY FURTHER RESOLVED THAT Gustavus Community Associations joins communities across the nation in expressing concern that the USA PATRIOT Act threatens civil rights and liberties guaranteed under the United States Constitution.

IT IS FURTHER RESOLVED THAT GCA supports individuals who, in their performance of GCA sponsored functions, refuse to comply with requests for information made under provisions of the USA PATRIOT Act including:

1. any initiation of participation in, assistance or cooperation with any inquiry, investigation, surveillance or detention; and

2. the recording, filing and sharing of any intelligence information concerning any person or organization, even if authorized by federal law enforcement, acting under new powers granted by the USA PATRIOT Act or

Executive Orders. That includes collection and review of library lending or research records, as well as book and video store sales and/or rental records.

PASSED AND APPROVED: February 13, 2003

Ayes: 16

Noes: 8

Abstain: 2

Submitted by: Mayor Jacobson
Introduced and Approved: April 21, 2003

CITY OF NORTH POLE
RESOLUTION 03-06

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NORTH POLE AFFIRMING CIVIL RIGHTS AND LIBERTIES; REQUESTING IMMEDIATE REVIEW OF FEDERAL MEASURES THAT INFRINGE ON CIVIL LIBERTIES

WHEREAS, the preservation of civil rights and liberties as guarded by the U.S. Constitution and the Bill of Rights is essential to the well-being of our democratic society; and

WHEREAS, federal, state and local governments should protect the public from terrorist attacks such as those that occurred on September 11, 2001 and should do so in a deliberate fashion to ensure that any new securities measures will enhance public safety without impairing constitutional rights or infringing on civil liberties; and

WHEREAS, in light of the horrific act of terrorism against the U.S. citizens and numerous other nationalities on September 11, 2001, it was a natural response on the part of the government to take actions to prevent such acts of terrorism in the future; and

WHEREAS, there is growing concern across the nation that language in the U.S. Patriot Act has expanded the government's power to use eavesdropping, surveillance, access to financial and computer records and other tools to track terrorist suspects in ways that were not fully understood by the public or elected officials at the time of its enactment; and

WHEREAS, the intent of this resolution is not to undermine the efforts of our elected officials to protect its citizens, nor to criticize the valiant men and women in law enforcement or military service.

NOW, THEREFORE, BE IT RESOLVED that the North Pole City Council requests members of the U.S. Congress to immediately re-examine the U.S. Patriot Act that it passed in October 2001, amending any portion of it that infringes upon the civil rights of U.S. citizens. This sweeping legislation required intense public review and comment before it was passed and enacted.

Submitted by: Mayor Jacobson
Introduced and Approved: April 21, 2003

BE IT FURTHER RESOLVED, that the North Pole City Council urges Congress not to re-authorize any provision in the U.S. Patriot Act or enact the proposed U.S. Patriot Act 2 without thorough public review of these Acts.

PASSED AND APPROVED BY A DULY CONSTITUTED QUORUM OF THE CITY COUNCIL OF NORTH POLE, ALASKA THIS 21st DAY OF APRIL, 2003.

_____

JEFFREY JAMES JACOBSON, Mayor

ATTEST:

_____

KATHRYN WEBER, City Clerk

Presented by: HRC
Introduced: 04/28/2003
Drafted by: HRC

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2201

A Resolution Establishing Assembly Policy With Respect to Federal Antiterrorism Legislation.

WHEREAS, CBJ denounces terrorism and appreciates and supports those who defend us from terrorism and terrorist attacks: the men and women serving in our armed forces, federal, state, and local law enforcement officers, firefighters, and health service professionals, and

WHEREAS, CBJ is committed to the protection of civil rights and liberties for all people as expressed in the United States and the Alaska Constitutions, and

WHEREAS, the First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," and

WHEREAS, the Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," and

WHEREAS, the Fifth Amendment states that "no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law," and

WHEREAS, the Sixth Amendment guarantees defendants "the right to a speedy and public trial, by an impartial jury," the right "to be informed of the nature and cause of the accusation," the right "to be confronted with the witnesses against him," and the right "to have the assistance of counsel for his defense."

WHEREAS, the Eighth Amendment states "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," and

WHEREAS, The Fourteenth Amendment states ". . . nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and

WHEREAS, the Assembly recognizes Juneau's diverse population, including citizens of other nations, whose contributions to the community are vital to its character and function, and

WHEREAS, in response to the terrorist attacks of September 11, 2001, the U.S. Congress passed the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002, and the executive branch has issued various Executive Orders, and

WHEREAS, due to the press of time, the USA PATRIOT Act and the Homeland Security Act did not receive the level of scrutiny that most Acts of Congress receive, and

WHEREAS, the USA PATRIOT Act at Section 412 authorizes the indefinite incarceration or deportation of non-citizens even if they have not committed a crime, and

WHEREAS, the USA PATRIOT Act at Section 216 reduces judicial supervision and civil liberties protections related to the use of devices which identify the caller, routing, and recipient of telephone and internet communications, and

WHEREAS, the USA PATRIOT Act at Section 214 expands the authority of federal courts to issue delayed-notice warrants authorizing secret searches so that the subject of a search warrant is unaware that the property has been searched,.

WHEREAS, the USA PATRIOT Act at Sections 215, 218, 219, 358, 507, and 508 grant law enforcement and intelligence agencies broader access to medical, mental health, library, business, financial, educational, and other records about individuals without first showing probable cause or evidence of a crime, and in some cases prohibits a person from disclosing to the individuals that such records have been searched, and.

WHEREAS, the USA PATRIOT Act at Sections 411 redefines "terrorist activity" and "terrorist organization" so broadly that it could have a chilling effect on free speech, and

WHEREAS, The Code of Federal Regulations has been amended at 28 CFR 501.3 to allow eavesdropping on conversations between terrorist suspects and their lawyers, and

WHEREAS, the President's Military Order of November 13, 2001 provides for trial of alien terrorist suspects by military commission, and pending such trial allows the Secretary of Defense to indefinitely detain the suspect within the United States or elsewhere without express limitation or condition except with regard to food, water, shelter, clothing, medical treatment and religious exercise.

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Affirmations.

a. CBJ affirms its strong opposition to terrorism, but also affirms that efforts to end terrorism should not be waged at the expense of the fundamental civil rights and liberties of the people of CBJ, the United States, and the world.

b. CBJ affirms the rights of all people living within CBJ to be treated in accordance with the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution.

Section 2. Action Items.

a. CBJ respectfully requests that the U.S. Congress formally review, and if necessary amend, the USA PATRIOT Act and the Homeland Security Act to ensure that they are consistent with the civil liberties which so many Americans have fought to preserve; Congress is also requested to review the executive orders adopted in response to the events of September 11, 2001 to insure they also are consistent with those fundamental civil liberties.

b. CBJ recognizes that its police officers, librarians, school officials, health workers, and other employees may receive requests for information under provisions of the USA PATRIOT Act or the Homeland Security Act and encourages CBJ employees to consult with the City Attorney's office if they have any doubts about the propriety of divulging information. The City Attorney is directed to train CBJ employees so that they are aware of their rights and responsibilities under the U.S. Constitution, the USA PATRIOT Act, and the Homeland Security Act.

c. CBJ Human Rights Commission is requested to report to the Assembly, insofar as its duty of confidentiality permits, whenever it receives a complaint that a citizen's civil rights or liberties have allegedly been infringed due to action authorized by the USA PATRIOT Act or the Homeland Security Act.

d. The United States Attorney for the District of Alaska is requested to provide the City Manager with an annual summary ~~of~~ *limited to the number of* investigations, warrants, orders, subpoenas, and arrests carried out within the City and Borough under the authority of the USA PATRIOT Act, the Homeland Security Act, and related executive orders. The City Manager shall make such information available to the public.

e. The Clerk is directed to distribute copies of this resolution to the federal and state legislative delegations and to the Untied States Attorney for the District of Alaska.

Section 3. Effective Date. This resolution shall be effective immediately upon adoption.

Adopted this day of 2003.

Sally Smith, Mayor

Attest:

Laurie J. Sica, Clerk

THE SENATE

TWENTY-SECOND LEGISLATURE, 2003

STATE OF HAWAII

S.C.R. NO. 18

SENATE CONCURRENT RESOLUTION

reaffirming the state of hawaii's commitment to civil liberties and the bill of rights.

WHEREAS, the Hawaii State Legislature is committed to upholding the United States Constitution and its Bill of Rights, and the Hawaii State Constitution and its Bill of Rights (Article I, Sections 1-22); and

WHEREAS, the State of Hawaii has a distinguished history of safeguarding the freedoms of its residents; and

WHEREAS, the State of Hawaii is comprised of a diverse and multi-ethnic population, and has experienced first hand the value of immigration to the American way of life; and

WHEREAS, the residents of Hawaii during World War II experienced first hand the dangers of unbalanced pursuit of security without appropriate checks and balances for the protection of basic liberties; and

WHEREAS, the recent adoption of the USA Patriot Act and several executive orders may unconstitutionally authorize the federal government to infringe upon fundamental liberties in violation of due process, the right to privacy, the right to counsel, protection against unreasonable searches and seizures, and basic First Amendment freedoms, all of which are guaranteed by the Constitutions of Hawaii and the United States; and

WHEREAS, the citizens of Hawaii are concerned that the actions of the Attorney General of the United States and the United States Justice Department pose significant threats to Constitutional protections; now, therefore,

BE IT RESOLVED by the Senate of the Twenty-Second Legislature of the State of Hawaii, Regular Session of 2003, the House of Representatives concurring, that the State of Hawaii urges its Congressional delegation to work to repeal any sections of the USA Patriot Act or recent executive orders that limit or violate fundamental rights and liberties protected by the Constitutions of Hawaii and the United States; and

BE IT FURTHER RESOLVED that to the extent legally possible, no state resources - including law enforcement funds and educational administrative resources - may be used for unconstitutional activities, including but not limited to the following under the USA Patriot Act:

(1) Monitoring political and religious gatherings exercising their First Amendment Rights;

(2) Obtaining library records, bookstore records, and website activities without proper authorization and without notification;

(3) Issuing subpoenas through the United States Attorney's Office without a court's approval or knowledge;

(4) Requesting nonconsensual releases of student and faculty records from public schools and institutions of higher learning; and

(5) Eavesdropping on confidential communications between lawyers and their clients.

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to Hawaii's delegation in the United States Congress.

OFFERED BY: _____

PASSED SENATE APRIL 3, 2003 21 - 3 - 1
PASSED HOUSE APRIL 25, 2003 35 - 12 - 4 E

POSTAGE PAID

The League of Women Voters

A Voice for Citizens, A Force for Change

6520 North Douglas Highway, Juneau, Alaska 99801 (907) 586-2690

April 22, 2003

Alaska State Legislator
State Capital
Juneau, Alaska 99801-1182

Dear Senator or Representative,

On April 11-13, 2003, the League of Women Voters held its annual convention. At the convention three resolutions were approved relating to current issues facing Congress and the Alaska State Legislature. Please read and consider the merits of these resolutions when asked to vote on the applicable bills.

03-01 Resolution urging the congressional delegation to support the repeal portions of the Uniting and Strengthening America by Providing Adequate Tools in Opposition to Terrorism Act (USA Patriot Act) and the Domestic Security Enhancement Act that violate the national Bill of Rights and other Constitutional guarantees of freedom and that they oppose the proposed Domestic Security Enhancement Act of 2003.

03-02 Resolution urging the Alaska State Legislature vote against SB 105 and HB 172 proposing to freeze eligibility for *Denali Kid Care* by changing the program need standard from a percentage of the Federal Poverty Level to a fixed dollar amount, thus eliminating inflation proofing of eligibility levels.

03-03 Resolution urging the Alaska State Legislature to oppose HB 157 and SB 119 relating to the elimination of the *Alaska Public Offices Commission* and urging the legislature appropriate resources sufficient to carry out the mission of APOC.

Thank you for your consideration of these resolutions. If you have any questions, please contact me.

Sincerely,

Cheryl Jebe

Attachments
Resolution 03-01 with Congressional letter
Resolution 03-02
Resolution 03-02

cc Governor Murkowski

LEAGUE OF WOMEN VOTERS OF ALASKA

RESOLUTION 03-01

A RESOLUTION DEFENDING THE UNITED STATES CONSTITUTION'S BILL OF RIGHTS

WHEREAS, the League of Women Voters of Alaska believes in the individual liberties guaranteed by the Constitution of the United States, the League is convinced that individual rights now protected by the Constitution should not be weakened or abridged; and

WHEREAS, the Alaska Constitution's Declaration of rights also upholds every person's individual rights including habeas corpus, due process, security from unwarranted search and seizure, and freedom of speech; and

WHEREAS, certain provisions of the Uniting and Strengthening America by Providing Adequate Tools in Opposition to Terrorism Act (USA PATRIOT Act), the Domestic Security Enhancement Act, and recent presidential Executive Orders threaten these rights which are central to our democracy; and

WHEREAS, the League of Women Voters of Alaska supports and respects public safety intelligence gathering as a part of law enforcement and national security, the League does not support any acts that infringe upon the civil rights of its citizens, the League of Women Voters of Alaska believes that security can be provided by existing constitutional methods.

NOW THEREFORE BE IT RESOLVED that the League of Women Voters of Alaska supports our government in its campaign against terrorism, but insists on preserving the liberties guaranteed by both our federal and state Constitutions, and

BE IT FURTHER RESOLVED, that the League of Women Voters of Alaska urges the Congressional delegation to support the repeal of those portions of the USA PATRIOT Act and Domestic Security Enhancement Act that violate the national Bill of Rights and other Constitutional guarantees of freedom and that they oppose the proposed Domestic Security Enhancement Act of 2003.

PASSED AND APPROVED by the delegates to the League of Women Voters of Alaska 2003 Convention, Juneau, Alaska, this 13th day of April, 2003.

Cheryl Jebe, President
League of Women Voters of Alaska

The League of Women Voters

6520 North Douglas Highway, Juneau, Alaska 99801 (907) 586-2690

April 22, 2003

The Honorable Ted Stevens
522 Hart Senate Building
Washington, D.C. 20510-0202

Dear Senator Stevens,

The League of Women Voters of Alaska passed the attached resolution defending the United States Constitution's Bill of Rights at its 2003 Convention April 13, 2003.

Certain provisions of the Uniting and Strengthening America by Providing Adequate Tools in Opposition to Terrorism Act (USA PATRIOT Act), the Domestic Security Enhancement Act, and recent presidential Executive Orders threaten rights which are central to our democracy. The LWVAK supports and respects public safety intelligence gathering as a part of law enforcement and national security, the League does not support any acts that infringe upon the civil rights of its citizens.

The League of women Voters of Alaska supports our government in its campaign against terrorism, but urges preservation of liberties guaranteed by both our federal and state Constitutions.

The League of Women Voters of Alaska urges you to support the repeal of those portions of the USA PATRIOT Act and Domestic Security Enhancement Act that violate the national Bill of Rights and other Constitutional guarantees of freedom and oppose the proposed Domestic Security Enhancement Act of 2003.

Sincerely,

Cheryl Jebe

Attachment: Resolution 03-01

cc Alaska State Legislators

The League of Women Voters

6520 North Douglas Highway, Juneau, Alaska 99801 (907) 586-2690

April 22, 2003

The Honorable Lisa Murkowski
322 Hart Senate Building
Washington, D.C. 20510-0202

Dear Senator Murkowski,

The League of Women Voters of Alaska passed the attached resolution defending the United States Constitution's Bill of Rights at its 2003 Convention April 13, 2003.

Certain provisions of the Uniting and Strengthening America by Providing Adequate Tools in Opposition to Terrorism Act (USA PATRIOT Act), the Domestic Security Enhancement Act, and recent presidential Executive Orders threaten rights which are central to our democracy. The LWVAK supports and respects public safety intelligence gathering as a part of law enforcement and national security, the League does not support any acts that infringe upon the civil rights of its citizens.

The League of women Voters of Alaska supports our government in its campaign against terrorism, but urges preservation of liberties guaranteed by both our federal and state Constitutions.

The League of Women Voters of Alaska urges you to support the repeal of those portions of the USA PATRIOT Act and Domestic Security Enhancement Act that violate the national Bill of Rights and other Constitutional guarantees of freedom and oppose the proposed Domestic Security Enhancement Act of 2003.

Sincerely,

Cheryl Jebe

Cheryl Jebe

Attachment: Resolution 03-01

cc Alaska State Legislators

The League of Women Voters

6520 North Douglas Highway, Juneau, Alaska 99801 (907) 586-2690

April 22, 2003

The Honorable Donald E. Young
2111 Rayburn House Office Building
Washington, D.C. 20510-0201

Dear Representative Young,

The League of Women Voters of Alaska passed the attached resolution defending the United States Constitution's Bill of Rights at its 2003 Convention April 13, 2003.

Certain provisions of the Uniting and Strengthening America by Providing Adequate Tools in Opposition to Terrorism Act (USA PATRIOT Act), the Domestic Security Enhancement Act, and recent presidential Executive Orders threaten rights which are central to our democracy. The LWVAK supports and respects public safety intelligence gathering as a part of law enforcement and national security, the League does not support any acts that infringe upon the civil rights of its citizens.

The League of women Voters of Alaska supports our government in its campaign against terrorism, but urges preservation of liberties guaranteed by both our federal and state Constitutions.

The League of Women Voters of Alaska urges you to support the repeal of those portions of the USA PATRIOT Act and Domestic Security Enhancement Act that violate the national Bill of Rights and other Constitutional guarantees of freedom and oppose the proposed Domestic Security Enhancement Act of 2003.

Sincerely,

Cheryl Jebe

Attachment: Resolution 03-01

cc Alaska State Legislators

Order Code RL31377

The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
Senior Specialist
American Law Division

The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists' communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists' attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as *The USA PATRIOT Act: A Sketch*, CRS REP.NO. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, CRS REP.NO. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.

Contents

The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists' attacks of September 11, 2001.[1] The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.

The Act originated as H.R.2975 (the PATRIOT Act) in the House and S.1510 in the Senate (the USA Act).[2] S.1510 passed the Senate on October 11, 2001, 147 *Cong.Rec.* S10604 (daily ed.). The House Judiciary Committee reported out an amended version of H.R. 2975 on the same day, H.R.Rep.No. 107-236. The House passed H.R. 2975 the following day after substituting the text of H.R. 3108, 147 *Cong.Rec.* H6775-776 (daily ed. Oct. 12, 2001). The House-passed version incorporated most of the money laundering provisions found in an earlier House bill, H.R. 3004, many of which had counterparts in S.1510 as approved by the Senate.[3] The House subsequently passed a clean bill, H.R. 3162 (under suspension of the rules), which resolved the differences between H.R. 2975 and S.1510, 147 *Cong.Rec.* H7224 (daily ed. Oct. 24, 2001). The Senate agreed, 147 *Cong.Rec.* S10969 (daily

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[1] P.L. 107-56, 115 Stat. 272 (2001); its full title is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT)."

[2] H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

[3] H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.

ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September.[4] The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists' communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.[5]

The tiers reflected the Supreme Court's interpretation of the Fourth Amendment's ban on unreasonable searches and seizures.[6] The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.[7] At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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[4] The Department's proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (*Draft*) and analysis (*DoJ*) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).

[5] For a general discussion of federal law in the area prior to enactment of the Act, *see*, Stevens & Doyle, *Privacy: An Overview of Federal Statutes Governing Wiretappping and Electronic Eavesdropping*, CRS REP.NO. 98-327A (Aug. 8, 2001); Fishman & McKenna, WIRETAPPING AND EAVESDROPPING (2d ed. 1995 & 2001 Supp.).

[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," *U.S. Const.* Amend. IV.

[7] Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.

criminal cases. When approved by senior Justice Department officials,[8] law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.[9]

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[8] "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of" one or more predicate offense, 18 U.S.C. 2516.

[9] The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnaping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), *1030 (computer abuse felonies)*, 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any

Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with *any* criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government's use of trap and trace devices and pen registers, a kind of secret "caller id", which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation,[10] but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); *(p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations);* (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (*i.e.*, electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

[10] Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.

- permits pen register and trap and trace orders for electronic communications (*e.g.*, e-mail)

- authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

- treats stored voice mail like stored e-mail (rather than like telephone conversations)

- permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system's owner)

- adds terrorist and computer crimes to Title III's predicate offense list

- reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

- encourages cooperation between law enforcement and foreign intelligence investigators

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (*e.g.*, e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).[11]

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[11] "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof)," section 216(b)(1).

The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).[12]

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider's customer records, 18 U.S.C. 2703(c)(1)(C).[13]

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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[12] The Justice Department urged the change in the name of expediency, "At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction," *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

[13] Prior to the amendment, "investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators," *DoJ* at §107.

Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable "without geographic limitation," 18 U.S.C. 2703.[14]

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, *United States v. Smith*, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.[15] The Act makes it clear that the cable rules apply when cable television viewing services are

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[14] Speaking of the law before amendment, DoJ explained, "Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the 'property' to be obtained 'be within the district' of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located," *DoJ* at §108.

[15] *See e.g., DoJ* at §109 ("Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act ('Cable Act') to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations").

involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

Electronic Surveillance. To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202.[16] A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (*i.e.*, a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(*i*). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.[17]

Criminal Investigators' Access to Foreign Intelligence Information. The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.[18] It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that "*the* purpose for the surveillance is to obtain foreign intelligence information," 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps "the purpose" might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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[16] 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

[17] "Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism." *DoJ* at §106. Elsewhere the Act defines "electronic surveillance" for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

[18] For a general discussion of federal intelligence and law enforcement cooperation, *see*, Best, *Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.*, CRS REP.NO. RL30252 (Dec. 3, 2001).

officials were required to either end surveillance or secure an order under Title III.[19]

The Justice Department sought FISA surveillance and physical search authority on the basis of "a" foreign intelligence purpose.[20] Section 218 of the Act insists that foreign intelligence gathering be a "significant purpose" for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

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[19] Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the "primary purpose" notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, "as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution." Subsequent case law, however, is not as clear as it might be: *see e.g., United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)("FISA permits federal officials to obtain orders authorizing electronic surveillance 'for the purpose of obtaining foreign intelligence information.' The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials's belief that the information sought is the type of foreign intelligence information described"); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)("We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial"); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)("Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue"); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)("Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance").

[20] "Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is 'a' purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts," *DoJ* at §153.

demanding standard than the "a purpose" threshold proposed by the Justice Department, but a clear departure from the original "the purpose" entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a "significant purpose" certification, 50 U.S.C. 1806(k), 1825(k).[21]

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act's safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.[22] The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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[21] "(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105." FISA defines "foreign power" and "agent of a foreign power" broadly, *see* note 33, *infra*, quoting, 50 U.S.C. 1801.

[22] "(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.

"(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect," section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is "a significant" reason rather than "the" reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).

121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).[23] Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,[24] but could not recover against the United States.[25] Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.[26] Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.[27] A third section,

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[23] 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.

[24] 18 U.S.C. 2520 and 2707 (2000 ed.).

[25] *Spock v. United States*, 464 F.Supp. 510, 514 n.2 (S.D.N.Y. 1978); *Asmar v. IRS*, 680 F.Supp. 248, 250 (E.D.Mich. 1987).

[26] Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

[27] "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

"Current law also contains an odd disconnect: a provider may disclose the *contents* of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose *non-content* records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems," *DoJ* at

section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices,[28] but makes it clear that nothing in the Act is intended to expand communications providers' obligation to make modifications in their systems in order to accommodate law enforcement needs.[29]

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.[30]

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA),[31] something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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§110.

[28] Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

[29] Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), *see*, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) ("This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any *additional* technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance").

[30] *E.g.*, As amended by section 902 of the Act, "'foreign intelligence' means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, *or international terrorist activities*," 50 U.S.C. 401a(2)(language added by the Act in italics).

[31] 50 U.S.C. 1801 *et seq.*

lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.[32]

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.[33] There were and still are extra

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[32] *E.g.*, 18 U.S.C. 2709 (counterintelligence access to telephone toll and transaction records), 12 U.S.C. 3414 (right to financial privacy), 15 U.S.C. 1681u(fair credit reporting).

[33] "As used in this subchapter: (a) 'Foreign power' means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

"(b) 'Agent of a foreign power' means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

"(c) 'International terrorism' means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

"(d) 'Sabotage' means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

"(e) 'foreign intelligence information' means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an

safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," *i.e.*, citizens or permanent resident aliens).[34] The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits "roving" surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is *a significant* reason for the application rather than *the* reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American's exercise of his or her First Amendment rights.

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agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States," 50 U.S.C. 1801.

[34] Strictly speaking for FISA purposes, a United States person "means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section," 50 U.S.C. 1801(i).

FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.[35] It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, *Draft* at §151.[36]

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.[37] It vests the Director of Central

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[35] For a general discussion of FISA prior to enactment of the Act, *see*, Bazan, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance*, CRS REP.NO. RL30465 (Sept. 18, 2001).

[36] *See also, DoJ* at §151, "This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens."

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order's minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

[37] *See e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000)("The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application

Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.).[38] It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American's exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials' access to telephone records, 18 U.S.C.

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process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA 'currency' requirement. This is the issue of how recent a subject's activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . .While existing law does not specifically address ``past activities,'' it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA `take' can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets"); *see also*, 147 *Cong.Rec.* S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

[38] "When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an 'agent of a foreign power' engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the 'agent of a foreign power' prong from the predication, and thus makes the FISA authority more closely track the criminal authority," *DoJ* at §155.

2709(b), and under the Right to Financial Privacy Act, 12 U.S.C. 3414(a)(5)(A), as well as the Fair Credit Reporting Act, 15 U.S.C. 1681u.[39]

Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (*e.g.*, e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.[40]

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[39] Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, *see DoJ* at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an 'agent of a foreign power.' In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the 'agent of a foreign power' predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

[40] When it requested the amendment, the Department of Justice explained that the "provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, 'in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.' This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are

Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.[41] The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,[42] in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury's authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

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trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible," *DoJ* at 152.

Section 314 of the Intelligence Authorization Act immunizes those who assist in the execution of either a FISA surveillance or physical search order (50 U.S.C. 1805(i)), 115 Stat. 1402.

[41] "The 'business records' section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general 'administrative subpoena' authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant," *DoJ* at §156.

[42] Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations "to obtain foreign intelligence information not concerning a United States person" in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).

to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.[43]

Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, "effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles," H.R.Rep.No. 107-63, at 10 (2001). The Justice Department's consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.[44]

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[43] H.R.Rep.No. 107-205, at 60-1 (2001)("This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

"The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

"Finally, this section facilitates government access to information contained in suspected terrorists' credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist's plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information").

[44] *See also, DoJ* at §103, "This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the

Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft* at §354.[45]

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft* at §154.[46]

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.[47] It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

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wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions."

[45] *See also, DoJ* at §354, "This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats." Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

[46] *See also, DoJ* at §154, "This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power."

[47] *Blair v. United States*, 250 U.S. 273, 281 (1919)(the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime").

affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to "any federal law enforcement, intelligence, protective, immigration, national defense, or national security" officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).[48]

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans.[49] The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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[48] These officers may receive: (1) "foreign intelligence information" that is, information regardless whether it involves Americans or foreign nationals that "[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;" or [b] "with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States," F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities" or [b] "information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, *or international terrorist activities*," 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

[49] Beale & Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy*, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)("There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury's investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury's awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury's investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes"); *but see*, Scheidegger et al., *Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections* 6 (Nov. 2001)("The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature").

court approval, H.R.Rep.No. 107- 236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure "identifies" Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b),[50] although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, "notwithstanding any other provisions of law," section 203(d).[51] It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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[50] Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) "foreign intelligence information" that is, information irrespective of whether it involves Americans or foreign nationals that "[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;" or [B] "with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;" (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C 401a (as amended by section 902 of the Act), *i.e.*, "As used in this Act: (1) The term 'intelligence' includes foreign intelligence and counterintelligence. (2) The term 'foreign intelligence' means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, *or international terrorist activities*. (3) The term 'counterintelligence' means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities" (language added by section 902 in italics).

[51] "Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information," §203(d)(1). The subsection goes to define "foreign intelligence information" in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).

nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.[52] By gathering the three into a single section Congress avoided the suggestion that the phrase "notwithstanding any other provision of law" constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.[53]

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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[52] *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)("It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

[53] *Draft* at §154, "Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [*i.e.* Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States."

computerized translation capability to be used in foreign intelligence gathering.[54] Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.[55] The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.[56]

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[54] "The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a 'National Virtual Translation Center.' Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

"The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so," S.Rep.No. 107-63, at 11 (2001).

[55] For a brief overview, *see*, Murphy, *Money Laundering: Current Law and Proposals*, CRS REP.NO. RS21032 (DEC. 21, 2001).

[56] *See e.g.*, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 ("It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings").

Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,[57] reflecting Congress' view that the information provided the IRS may be valuable for other law enforcement purposes.[58] This concern is likewise

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[57] Section 365, 31 U.S.C. 5331; Sec. 321, 31 U.S.C. 5312.

[58] H.R.Rep.No. 107-250, at 38-9 (2001)("Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

"Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a 'Safeguard Procedures Report' which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

"While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement

reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service's role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.[59] Section 355 expands the immunity to cover disclosures in

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authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer").

[59] "Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act's 'safe harbor' provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

"First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that 'any financial institution that * * * makes a disclosure pursuant to * * * any other authority * * * shall not be liable to any person' is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

"Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the

employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.[60]

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an "intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes," 55 *Fed.Reg.* 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

Special Measures. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required "special measures" and additional "due diligence" requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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potential wrongdoing was also reported in a SAR," H.R.Rep.No. 107-250, at 66 (2001).

[60] 31 U.S.C. 1828(w). "This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure," H.R.Rep.No. 107-250, at 67 (2001).

laundering concern.[61] These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to "know-your-customer" requirements concerning foreign customers who use "payable-through accounts" held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions' customers whose transactions are routed through the foreign financial institution's correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.[62]

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[61] 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction's bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction's banking regulation; the volume of financial transactions in relation to the size of the jurisdiction's economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

[62] The House report describes these measures in greater detail: "Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five 'special measures' if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a 'primary money laundering concern.' Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental 'interested parties,' including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

"Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate

business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five 'special measures' the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a 'payable-through account' for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A 'payable-through account' is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a 'correspondent' account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term 'correspondent account' means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions' correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed