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Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.[63]

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by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation," H.R.Rep.No. 107-250, at 68-9.

[63] *See generally,* H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,

General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business[64]) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.[65]

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions' concentration account practices.[66]

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions' minimum new customer identification standards and record-

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detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

"This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section").

[64] Or more exactly, a bank which has no physical presence in any country; a "physical presence" for a foreign bank is defined as "a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities," 31 U.S.C. 5318(j)(4).

[65] 31 U.S.C. 5318(j); H.R.Rep.No. 107-250, at 72 (2001).

[66] The Act does not define "concentration accounts," although the House Financial Services Committee report provides some incite into the section's intent, H.R.Rep.No. 107-250, at 72-3 (2001)("This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.")

keeping and to recommend a means to effectively verify the identification of foreign customers.[67]

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[67] 31 U.S.C. 5318(*l*); H.R.Rep.No. 107-250, at 62-3 (2001)("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing 'customers' in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined 'customers' and 'customer relationship' for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to 'look through' the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to 'look through' the plan to identify its participants.

"Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

"Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

"Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

"Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

"Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).

Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution's anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities' requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(κ). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.[68]

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board's property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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"Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill").

[68] 31 U.S.C. 5318(h); H.R.Rep.No. 107-250, at 72 (2001).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.[69]

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.[70]

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (*i.e.*, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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[69] 31 U.S.C. 5313 note; H.R.Rep.No. 107-205, at 65 (2001).

[70] H.R.Rep.No. 107-250, at 67 (2001)("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

"The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime").

Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)
- felony violations of the Foreign Agents Registration Act, 22 U.S.C. 618.

As the report accompanying H.R. 3004 explains:

> This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318

expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.[71]

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.[72] It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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[71] "[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds 'by, to or through a financial institution.' For the purposes of both statutes, the term 'financial institution' is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

"The definition of 'financial institution' in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of 'commercial bank' or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a 'financial institution' in 1956(c)(6) to establish that the transaction was a 'financial transaction' within the meaning of 1956(c)(4)(B) (defining a 'financial transaction' as a transaction involving the use of a 'financial institution'), or that it was a 'monetary transaction' within the meaning of 1957(f) (defining 'monetary transaction' as, inter alia, a transaction that would be a 'financial transaction' under 1956(c)(4)(B)).

"Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of 'specified unlawful activities.' 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B)," H.R.Rep.No. 107-250, at 38 (2000).

[72] *Cf.*, H.R.Rep.No. 107-250, at 57.

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached "knowingly" and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.[73]

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.[74] They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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[73] "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

"Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

"Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive," H.R.Rep.No. 107-250, at 54 (2001).

[74] "This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses," H.R.Rep.No. 107-250, at 75-6 (2001).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

Bulk Cash. Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act's bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.[75]

The section appears to be the product of reactions to the Supreme Court's decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution's excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department's assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court's

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[75] "For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual," 31 U.S.C. 5332(a)(2).

examination of forfeiture in false reporting cases under the Constitution's Excessive Fines Clause.[76]

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity *and* some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, "[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States," *DoJ* at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

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[76] "As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

"Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In *United States v. Bajakajian*, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

"Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the *Bajakajian* decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute," H.R.Rep.No. 107-250 at 36-7 (2001).

under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.[77]

Venue. Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, "if the defendant participated in the transfer of the proceeds," 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,[78] in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that "money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another," 524 U.S. at 8.[79]

Forfeiture. Forfeiture is the government confiscation of property as a consequence of crime.[80] The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

Constitutional Considerations. The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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[77] *United States v. Bowman*, 260 U.S. 94, 97-8 (1922); *Ford v. United States*, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, *see,* Doyle, *Extraterritorial Application of American Criminal Law*, CRS REP.NO. 94-166A (Mar. 13, 1999).

[78] "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed," *U.S.Const.* Art.III, §2, cl.3.

"[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law," *U.S.Const.* Amend. VI.

[79] *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm "during and in relation to" a crime of violence.

[80] For general background information, *see*, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars.[81] By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).[82] The characterization of the defenses as "affirmative defense" indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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[81] "This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war *or* national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only 'during the time of war.' 50 App.U.S.C. §5(b).

"This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

"The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2)," *DoJ* at §159.

[82] "An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case," Sec. 316(a).

excepted from the coverage of 18 U.S.C. 983.[83] The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.[84]

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.[85] Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),[86] against the United States, Americans or their property, 18 U.S.C.

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[83] 18 U.S.C. 983(i)(2)(D).

[84] "The exclusion of certain provisions of Federal law from the definition of the term 'civil forfeiture statute' in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subschapter II of chapter 5 of title 5, United States Code (commonly known as the 'Administrative Procedure Act')," Sec. 316(c)(1).

[85] "Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield 'proceeds,' and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

"This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001," *DoJ*, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

[86] "(1) the term 'international terrorism' means activities that – (A) 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 of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term 'domestic terrorism' means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct

981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,[87] which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer's profits, and the rum runner's ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon's property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon's right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that "no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted."[88] And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.[89]

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of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States," 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

[87] *Austin v. United States*, 509 U.S. 602, 611-12 (1993)("Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England's three kinds of forfeiture, only the third took hold in the United States").

[88] *U.S.Const.* Art.III, §3, cl.2.

[89] 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.

Neither section 106 nor 806 require conviction of the terrorist property owner.[90] Both call for forfeiture of all of the terrorist's property, without requiring any nexus to the terrorist's offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist's heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President's war powers.[91] The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.[92] Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President's war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment's excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.[93] The Fifth Amendment's double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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[90] Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)("If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act").

[91] *Silesian American Corp. V. Clark*, 332 U.S. 469 (1947); *cf., Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)("this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure").

[92] *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) ("While the statute under which the funds are to be 'held, administered and accounted for' authorizes the vesting of such foreign-owned property in the custodian and its administration 'in the interest of and for the benefit of the United States,' it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds 'shall be equitably applied for the payments of debts").

[93] *United States v. Bajakajian*, 524 U.S. 321, 337 (1998); *Austin v. United States*, 509 U.S. 602, 622 (1993).

any presumption of remedial purposes.[94] The same has been said of the applicability of the ex post facto clause.[95]

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806 , the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.[96] If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.[97]

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[94] *United States v. Ursery*, 518 U.S. 267, 278 (1996).

[95] *See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)*, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law's demands, *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994).

[96] *DoJ*, at §403.

[97] 18 U.S.C. 1956(b). *Cf.*, H.R.Rep.No. 107-250, at 54-5 (2001)("The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss

In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.[98] Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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American Bank, 191 F.3d 30 (1st Cir. 1999).

"The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

"This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

"The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act").

[98] 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)("Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. "To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

"Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

"The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests").

defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.[99]

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.[100] Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.[101] This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.[102]

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[99] *Cf.*, H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

[100] 18 U.S.C. 981(a)(1)(B).

[101] H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

[102] H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking

A fugitive may not challenge a federal forfeiture.[103] Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in "order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations."

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to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking 'two bites at the apple' by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

"This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) ('the [G]overnment is not required to ensure actual receipt of notice that is properly mailed'); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

"Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision."). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, *i.e.*, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, *i.e.*, any foreign equivalent of a federal crime which would support a confiscation order.

[103] 28 U.S.C. 2466.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417

- instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008[104]

- authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

- authorize reciprocal sharing of the State Department's visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.

Prior law recognized five terrorism-related categories of inadmissibility. Section 411 redefines two of these – engaging in terrorist activity and representing a terrorist organization (8 U.S.C. 1182(a)(3)(B)(iv), (a)(3)(B)(i)(IV)) – and it adds three more – espousing terrorist activity, being the spouse or child of an inadmissible alien associated with a terrorist organization, and intending to engage in activities that could endanger the welfare, safety or security fo the United States (8 U.S.C. 1182(a)(3)(B)(i)(VI), (a)(3)(B)(i)(VII), 1182(a)(3)(F). It defined engaging in terrorist activity, which is grounds for both inadmissibility and deportation, to encompass soliciting on behalf of a terrorist organization or providing material support to a terrorist organization, 8 U.S.C. 1182(a)(3)(B)(iii)(2000 ed.). It did not explain in so many words, however, what constituted a "terrorist organization," but it presumably included groups designated as terrorist organizations under section 219 of the Immigration and Nationality Act, 8 U.S.C. 1189.

Section 411 defines "terrorist organization" to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the *Federal Register* as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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[104] As the House Judiciary Committee explained, "A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person's fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System," H.R.Rep.No. 107-236, at 78 (2001).

1182(a)(3)(B)(iv). Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in "premeditated, politically motivated violence perpetrated against noncombatant targets," or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without

express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 *Fed.Reg.* 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421[105]
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422[106]

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[105] "The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident," H.R.Rep.No. 107-236, at 66-7 (2001).

[106] "The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the noninmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

"The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

"Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter

• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423[107]

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424[108]

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

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the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

"Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 3'.

"Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days

"Under the Act, in the case of an alien granted voluntary departure that expired between September 11 and October 11, 2001, voluntary departure is extended an additional 30 days," H.R.Rep.No. 107-236, at 67-8 (2001).

[107] "Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

"The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for pennanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

"The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death)," H.R.Rep.No. 107-236, at 68 (2001)..

[108] "Under current law, certain visas are only available to an alien until the alien's 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien's 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien's 21st birthday," H.R.Rep.No. 107-236, at 68 (2001).

• a denial of benefits of the Act to terrorists and their families, section 427

•authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section

when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,[109] the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.[110] Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.[111]

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[109] "Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of 'for use as a weapon' to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government's ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . ." *DoJ* at §305.

[110] The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

[111] "18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill," *DoJ* at §307; *Draft* at §307(2)("There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law").

The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;
- air piracy, 49 U.S.C. 46502.

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.[112]

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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[112] *U.S.Const.* Art.III, §2, cl.3 ("The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . ."); Amend. IV ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ."); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)("By way of comparison, last Term in [*Cabrales*] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant's money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the 'during and in relation to' language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense").

- chemical weapons offenses, 18 U.S.C. 229;
- terrorist attacks on mass transportation, 18 U.S.C. 1993 ;
- sabotage of a nuclear facility, 42 U.S.C. 2284; and
- sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of "training" and "personnel," *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-136 (9th Cir. 2000).[113] Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.[114]

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.[115]

Prior law, 18 U.S.C. 2325-2327, outlawed violation of Federal Trade Commission (FTC) telemarketing regulations promulgated under 15 U.S.C. 6101 *et seq.* Section 1011 of the Act brings fraudulent charitable solicitations within the FTC's regulatory authority.[116]

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[113] The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," *DoJ* at 306.

[114] *U.S.Const.* Art.III, §2, cl.3; Amend. IV; *United States v. Cabrales*, 524 U.S. 1 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

[115] "The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes," *DoJ*, at §304.

[116] For a general discussion, *see*, Wellborn, *Combating Charitable Fraud: An Overview of State and Federal Law*, CRS REP.NO. RS21058 (Nov. 7, 2001).

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.[117]

The proposal, however, failed to identify the critical elements that would trigger the alternative.[118] Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some "garden variety" crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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[117] "Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill ('Federal terrorism offenses' is used in defining the scope of the provision,"*DoJ*, at §302.

[118] "A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense," *Draft* at §302.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.[119] Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

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[119] "The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

"This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of 'Federal terrorism offense,' which is defined in section 309 of the bill," *DoJ* at §303.

- interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
- carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
- sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of "at least 5 years" in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (*e.g.*, at least but not more than 5 years).[120] The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),[121] a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

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[120] *Compare, United States v. Barragan*, 263 F.3d 919, 925-26 (9th Cir. 2001); *United States v. Pratt*, 239 F.3d 640, 646-48 (4th Cir. 2001); *United States v. Heckard*, 238 F.3d 1222, 1237 (10th Cir. 2001); and *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *with, United States v. Meshack*, 225 F.3d 556, 578 (5th Cir. 2001); and *United States v. Samour*, 99 F.3d 821, 824-25 (6th Cir. 2001).

[121] "Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

"This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

"This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted," *DoJ* at §308.

Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving "federal protected computers" (*i.e.*, those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).[122]

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes "sneak and peek" search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims' compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.[123]

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[122] It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or reckless causing the damage) is limited to special circumstances, *e.g.*, damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

[123] When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, "the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context," 147 *Cong.Rec.* H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, *see*, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).

Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, *e.g.*, P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used "without limitation" to pay rewards to prevent, investigate, or prosecute terrorism.[124]

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.[125]

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude "sneak and peek" warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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[124] The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

[125] For a general discussion of the Posse Comitatus Act, *see*, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).

measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf., United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).[126]

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[126] "The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth

The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993).[127] The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).[128]

Amendment, demands that surreptitious entries be closely circumscribed," *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

[127] "No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. *See United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . .Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles," *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

[128] In *Simons*, a search team entered Simons' office at night in his absence and "copied the contents of Simons' computer; computer diskettes found in Simons' desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days." A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, "[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed 'ministerial' in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The

The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.[129]

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 *Cong.Rec.* H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (*e.g.*, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (*e.g.*, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure "reasonably necessary." It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, *i.e.*, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.[130] The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, *i.e.*, it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search," 206 F.3d at 403.

[129] "The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities," *DoJ* at §353.

[130] Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.

constitutionally "reasonable," that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

Nationwide terrorism search warrants. The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either "within or outside the district," (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases.[131] The provision may anticipate execution both in this country and overseas.[132] The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.[133] Neither Rule 41 nor any other provision of federal

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[131] The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: "(1) the term 'international terrorism' means activities that – (A) 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 of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term 'domestic terrorism' means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States," 18 U.S.C. 2331(1),(5).

[132] The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. "The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed," *DoJ* at §351.

[133] *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)("United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials"); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)("if American law enforcement officials substantially participated in the search or if the

law apparently contemplated extraterritorial execution, *cf.*, F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected). [134]

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for "search of property *or for a person* within or outside the district," §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, "lest the rule be read as a substitute for extradition proceedings," F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

Terrorists' DNA. The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. [135] Existing federal law allowed the Attorney General to collect samples from

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foreign officials conducting the search were actually acting as agents for their American counterparts"); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)("where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials" or "where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials"); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)("where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts"); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)("if American officials or officers participated in some significant way"); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the "joint venture" standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)("if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts"); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

[134] The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has "extraterritorial jurisdiction," 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase "extraterritorial jurisdiction" was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 *Cong.Rec.* 4982-983 (1934)("The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco"); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

[135] *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.[136]

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,[137] and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.[138]

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[136] Summarizing the law in place at the time, the Department of Justice argued that, "The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes," *DoJ* at §353.

For a general discussion, *see*, Fischer, *DNA Identification: Applications and Issues*, CRS REP.NO. RL30717 (Jan. 12, 2001).

[137] 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

[138] "This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

"This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in

The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism[139] that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay "caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[140] Moreover, a judicial difference of opinion has appeared in those cases

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connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., *United States v. Grimes*, 142 F.3d 1342, 1350-51 (11th Cir. 1998); *People v. Frazer*, 982 P.2d 180 (Cal. 1999).

"Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

"In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists ('Federal terrorism offenses'), as specified in section 309 of this bill," *DoJ* at 301.

[139] As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

[140] *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. Lovasco*, 431 U.S. 783,790 (1977).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation *as long as it does not revive an expired period*.[141] Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.[142]

Section 809 applies "to the prosecution of any offense committed before, on, or after the date of enactment of this section," the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (*Grimes*, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (*Frazer*, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

Extraterritoriality. Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) ("Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . ."). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.[143]

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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[141] *United States v. De La Matta*, 266 F.3d 1275, 1286 (11th Cir. 2001); *United States v. Grimes*, 142 F.3d 1342, 1351 (11th Cir. 1998); *United States v. Morrow*, 177 F.3d 272, 294 (5th Cir. 1999); *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928).

[142] *People v. Frazer*, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

[143] *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).

The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.[144]

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act's victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq.*

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer's death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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[144] *Compare, United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); *United States v. Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000); *with, United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000); *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973).

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund's availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops "crimes involving terrorism" from the definition of "compensable crime"; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the "double dipping" restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)

• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that *not more* than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and *not less* than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a "double dipping" restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service's investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.

For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD's Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President's authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the *design* of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).

Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,[145] or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.[146]

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[145] *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

[146] For a general discussion of trade sanctions legislation, *see*, Jurenas, *Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation*, CRS ISSUE BRIEF IB100061.

HJR

26

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHJR 26(W&M)
(H) Publish Date: 5/2/03

Revision Date/Time (Note if correction):
Dept. Affected: Office of the Governor
Title: Constitutional Amendment limiting appropriations from and inflation-proofing the APF....
BRU: Elections
Component: Elections
Sponsor: House Rules Committee
Requester: House Ways and Means
Component No.: 21

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		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	1.5	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		1.5				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	1.5	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark 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)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. If this measure requires the printing of an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by: Lauri Allred
Phone 465-5347
Division: Division of Elections
Date/Time 4/18/03 11:46 AM
Approved by: Laura A. Glaiser, Director
Date 4/18/2003
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHJR 26(W&M)
(H) Publish Date: 5/2/03

Revision Date/Time (Note if correction):
Dept. Affected: Revenue

Title: Constitutional Amendment: Permanent Fund Appropriations
BRU: Permanent Fund Corp
Component: Permanent Fund Corp

Sponsor: House Rules Committee
Requester: House Ways and Means
Component No.: 109

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)*

HJR 26 would ask voters in the next general election whether to approve a constitutional amendment that would limit annual appropriations to no more than 5% of the average year-end market value of the fund for the preceding five years.

HJR 26 would not affect the budgeted costs to manage and invest the Permanent Fund, nor would it change the amount of income earned by Permanent Fund investments.

See the attached schedule for financial projections of the Fund comparing the "Status Quo" to a 5% percent-of-market-value (POMV) spending limit.

Prepared by: Robert D. Storer, Executive Director — Phone (907)465-2047
Division: Alaska Permanent Fund Corporation — Date/Time May 2, 2003, 10 a.m.
Approved by: Steve Porter, Deputy Commissioner — Date 5/2/2003
Agency: Department of Revenue

Alaska Permanent Fund Corporation

HJR 26 - Financial projection comparison of the Alaska Permanent Fund under status quo versus POMV spending limit, beginning in FY05.

$ millions

Status Quo	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
			projected								
Total Return	-3.42%	7.38%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%
Principal - end of year (after payouts)	22,348	23,268	24,149	25,057	25,988	26,937	27,910	28,899	29,899	30,918	31,956
Realized earnings reserve (after payouts)	633	398	648	1,102	1,581	2,028	2,446	2,886	3,358	3,865	4,487
Unrealized earnings reserve	(632)	118	610	960	1,232	1,468	1,708	1,929	2,135	2,332	2,434
Total earnings reserve - end of year (after payouts)	0	516	1,258	2,062	2,813	3,496	4,154	4,816	5,493	6,197	6,921
Total Market Value End of Year (after payouts)	22,349	23,784	25,407	27,118	28,801	30,433	32,065	33,715	35,392	37,115	38,876
Annual net income	(851)	1,620	1,775	1,897	2,026	2,152	2,275	2,397	2,521	2,647	2,776
Dividend (lump sum) - Status Quo	686 *	510	409	442	597	766	887	979	1,059	1,131	1,209
Transfer status quo Inflation-proofing (ER to principal)	102	590	612	635	659	683	707	732	758	783	810

*** The APFC FY03 projected dividend, paid to Alaska citizens in October, 2003 is subject to available earnings reserve. The volatility in the stock market has taken earnings reserve to zero or below several times this fiscal year. If the earnings reserve balance is zero or negative on 6/30/03, no dividend distribution will be paid to the Department of Revenue.**

POMV - 5% (beginning in FY05)	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
			projected 5% POMV beginning in FY05								
Total Return			7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%
Total Market Value End of Year (after payouts)		23,784	24,581	25,429	26,307	27,186	28,078	28,978	29,881	30,795	31,717
Annual net income			1,775	1,834	1,898	1,963	2,028	2,094	2,161	2,228	2,295
POMV Payout available for appropriation in lump sum			1,235	1,243	1,274	1,329	1,380	1,426	1,473	1,520	1,568
5 year average market value			24,706	24,854	25,480	26,576	27,608	28,526	29,463	30,409	31,363

Assumptions: Callan Associates 2003 Capital Market Assumptions, APFC 2003 asset allocation, Spring 2003 revenue forecast, financial statements through 3/31/03. All payouts are assumed to happen at fiscal year end, all dollar values in millions.

File F:\Personal Excel Files\Budget_Statusqo\APFC Status quo_3_31_03_No_33.xls

1:23 PM, 4/21/2003, Last Updated 04/17/03

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHJR 26(FIN)
(H) Publish Date: 4/7/04

Revision Date/Time (Note if correction):
Dept. Affected: GOV

Title: Constitutional amendment relating to and limiting appropriations from and inflation-proofing APF
RDU: Elections
Component: Elections

Sponsor: Rules
Requester: House Finance
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	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	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. If this measure requires the printing of an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by: Leonard G. Jones
Phone 465-3051
Division: Division of Elections
Date/Time 1/16/04 9:06 AM
Approved by: Laura A. Glaiser, Director
Date 1/16/2004
Agency: Office of the Lt. Governor, Division of Elections

(Revised 12/2003 OMB)

ALASKA PERMANENT FUND CORPORATION

RESOLUTION OF THE BOARD OF TRUSTEES OF THE ALASKA PERMANENT FUND CORPORATION RELATING TO A CONSTITUTIONAL AMENDMENT LIMITING APPROPRIATIONS FROM AND INFLATION-PROOFING THE ALASKA PERMANENT FUND BY ESTABLISHING A PERCENT OF MARKET VALUE SPENDING LIMIT

RESOLUTION 03-05

Preserving the real value of the money deposited into the Alaska Permanent Fund ("Fund") over the long term has been a public policy priority of the Board of Trustees ("Board") since the original Board was appointed over 20 years ago. In response to the Board's concerns in 1982 about the effects of inflation on the value of the Fund, the legislature adopted statutory inflation-proofing that same year. That change has successfully protected (by statute) the principal of the Fund for the past 20 years. After several years of review, the Board believes it is now time for the People of Alaska to make another decision that would: 1) constitutionally protect the current purchasing power of the whole Fund (both principal and income) against inflation; and 2) improve the rules governing distributions from the Fund.

To accomplish these goals, the Board has examined the use by various large endowment and public funds of a formula approach to establish appropriate limits on the size of payouts from those funds. This formula approach, generally referred to as a "percent of market value" ("POMV") spending limit, is applied by those funds in a manner that assures that, on average, only *real* income of a fund (i.e. income *net of inflation*) can be spent, thereby assuring that the real value of the contributions paid into the fund will not be touched. Because a POMV spending limit would provide for distributions from the Fund that are

predictable and limited, the Board believes that its use is in the best interest of the Fund and of the people of the State of Alaska.

The Board further believes that the best way to implement a POMV spending limit methodology for determining a level of distributions from the Fund that is predictable and limited is to amend the constitutional provision that established the Fund (Article IX, section 15 of the Alaska Constitution). Providing for a POMV spending limit in this manner would assure all Alaskans that the real value of the contributions to the Fund will be preserved for all time.

At the Board's request, APFC staff has presented a draft constitutional amendment for further discussion by the Board which, if adopted by the people of the State of Alaska, would provide for the following:

1. an annual limit on appropriations from the Fund of up to five percent of the total market value of the Fund, averaged over a period of five years;

2. using a five year period that allows the legislature and the governor to know before a fiscal year begins the exact amount that will be available for distribution from the Fund;

3. Fund income is part of the Fund, rather than being subject to appropriation by the legislature, as currently provided;

4. assures that the current statutory earnings reserve account established by AS 37.13.145 becomes part of the Fund when the constitutional amendment takes effect; and

5. the current references to "principal" and "income" are removed, as POMV ensures protection of the principal over the long-term through a constitutional spending limit.

The Board believes that this approach effectively balances the goal of providing for an annual distribution from the Fund that is predictable and limited with the long-term goal of protecting the real value of contributions to the Fund.

In addition, the Board believes strongly that implementing a POMV spending limit approach by constitutional amendment is such an important public policy goal that proposals for incorporating any other amendments to Article IX, section 15 which might in any way either lessen the chances of approval of such an amendment by the voters or undermine the legal status of the Fund should be rejected by the legislature.

Finally, the Board recognizes that implementation of a POMV spending limit methodology by constitutional amendment may necessitate changes to existing statutes that deal with the formula for determining and distributing the amount of the Fund that may be spent each year, including, but not necessarily limited to, payment of Permanent Fund Dividends and inflation-proofing the Fund. In anticipation of voter approval of a constitutional amendment providing for a POMV spending limit, the Board is hopeful that the legislature and the governor will work together to develop appropriate legislation to harmonize existing statutory provisions with the operation of the amendment and/or to adopt such new statutes as they may consider desirable. In this regard, the Board and APFC staff stand ready to provide any information or other assistance that may be helpful.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees that the legislature of the State of Alaska, in consultation with the governor and the Board, are urged to consider and approve the proposal (dated 4/14/03) for a constitutional amendment that would implement a POMV spending limit mechanism that would provide an annual distribution from the Fund that is predictable and limited.

BE IT FURTHER RESOLVED by the Board of Trustees that the proposal for such an amendment be limited solely to implementation of the foregoing goal.

PASSED AND APPROVED by the Board of Trustees of the Alaska Permanent Fund Corporation this 14th day of April 2003.

Eric E. Wohlforth

Chair, Board of Trustees

ATTEST:

Robert D. Storer, Corporate Secretary

Methods to determine funds available for appropriation:

Five key differences between the Status quo and the proposed Percent of Market Value (P.O.M.V.)

A presentation by the Alaska Permanent Fund Corporation
to the House Ways and Means Committee
April 21, 2003

Five key differences between the status quo and POMV

1. POMV offers constitutional inflation-proofing protection of the entire Fund. The status quo statutorily inflation-proofs Fund principal.

2. POMV is a spending limit. It limits funds available for appropriations to real income over time. Under the status quo, the entire earnings reserve may be appropriated.

3. During volatile markets, POMV offers greatly improved stability in year-to-year amounts available for appropriation as compared to the status quo.

Differences between the status quo and POMV

4. POMV is compatible with the Fund's diversified, long-term investment strategy of achieving a 5% real rate of return over time. The status quo was designed a quarter century ago for a Fund invested 100% in bonds.

5. Predictable annual appropriations are provided under POMV. Under the status quo, it is not known whether funds will be available for appropriation in any given year.

Alaska Permanent Fund Corporation

HJR 26 - Financial projection comparison of the Alaska Permanent Fund under status quo versus POMV spending limit, beginning in FY05.

$ millions

Status Quo	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
					projected						
Total Return	-3.42%	7.38%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%
Principal - end of year (after payouts)	22,348	23,268	24,149	25,057	25,988	26,937	27,910	28,899	29,899	30,918	31,956
Realized earnings reserve (after payouts)	633	398	648	1,102	1,581	2,028	2,446	2,886	3,358	3,865	4,487
Unrealized earnings reserve	(632)	118	610	960	1,232	1,468	1,708	1,929	2,135	2,332	2,434
Total earnings reserve - end of year (after payouts)	0	516	1,258	2,062	2,813	3,496	4,154	4,816	5,493	6,197	6,921
Total Market Value End of Year (after payouts)	22,349	23,784	25,407	27,118	28,801	30,433	32,065	33,715	35,392	37,115	38,876
Annual net income	(851)	1,620	1,775	1,897	2,026	2,152	2,275	2,397	2,521	2,647	2,776
Dividend (lump sum) - Status Quo	686	510	409	442	597	766	887	979	1,059	1,131	1,209
Transfer status quo Inflation-proofing (ER to principal)	102	590	612	635	659	683	707	732	758	783	810

POMV - 5% (beginning in FY05)	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
			projected 5% POMV beginning in FY05								
Total Return			7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%	7.60%
Total Market Value End of Year (after payouts)		23,784	24,581	25,429	26,307	27,186	28,078	28,978	29,881	30,794	31,717
Annual net income			1,775	1,834	1,898	1,963	2,028	2,094	2,161	2,228	2,295
POMV Payout available for appropriation in lump sum			1,235	1,243	1,274	1,329	1,380	1,426	1,473	1,520	1,568
5 year average market value			24,706	24,854	25,480	26,576	27,608	28,526	29,463	30,409	31,363

Assumptions: Callan Associates 2003 Capital Market Assumptions, APFC 2003 asset allocation, Spring 2003 revenue forecast, financial statements through 3/31/03. All payouts are assumed to happen at fiscal year end, all dollar values in millions.

Alaska Permanent Fund Corporation

Calculation of annual effective rates of 5% POMV spending limit
$ millions

	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Payout based on 5 year moving average	1,235	1,243	1,274	1,329	1,380	1,426	1,473	1,520	1,568
Ending market value (after payout)	24,581	25,429	26,307	27,186	28,078	28,978	29,881	30,795	31,717
Ending market value (pre payout)	25,816	26,672	27,581	28,515	29,458	30,404	31,354	32,315	33,285
Effective payout rate *	4.78%	4.66%	4.62%	4.66%	4.69%	4.69%	4.70%	4.71%	4.71%

	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
Payout based on 5 year moving average	1,235	1,243	1,274	1,329	1,380	1,426	1,473	1,520	1,568
less APFC costs to manage the Fund	38	39	41	42	43	44	46	47	49
5% available for spending after deducting APFC costs	1,197	1,203	1,233	1,287	1,337	1,382	1,427	1,473	1,520
Effective rate after deducting APFC costs *	4.64%	4.51%	4.47%	4.51%	4.54%	4.55%	4.55%	4.56%	4.57%
APFC costs to manage the Fund in %	0.16%	0.16%	0.16%	0.16%	0.16%	0.16%	0.16%	0.16%	0.16%

** Note: The effective rate is defined as the payout over the ending market value of the Fund (pre-payout) expressed as a percentage.*

Testimony before the
House Special Committee on Ways & Means
Clark S. Gruening
April 22, 2003

Mr. Chairman and members of the House Special Committee on Ways & Means, thank you for the opportunity to discuss with you HJR 26, a proposed constitutional amendment for inflation-proofing the Alaska Permanent Fund.

Before speaking to how this proposal changes the way the Permanent Fund is inflation-proofed, I'd like to make some brief comments about how the Board came to recommend this change.

For 23 of the Fund's 27 years of existence, the APFC has been governed by a six- member Board of Trustees. Protecting the Fund against inflation has been the highest public policy goal of the Trustees since the original Board was appointed in 1980. The first Board testified to the legislature that the greatest threat to the permanence of the Fund is inflation. In response, the legislature adopted statutory inflation-proofing in 1982.

In more recent years, the Board has examined the use by various large endowments and public funds of a formula approach to determine the method and size of payouts from these funds. This approach is generally referred to as "percentage of market value" payouts or "POMV" for short.

The purpose of placing this formula in the state constitution is to protect the long-term real value of the Fund and to provide consistent and predictable distributions for the long-term. After considerable review and discussion, the Board recommended in February of 2001, a constitutional change in the form of

HJR 15 and SJR 13 which received committee hearings but did not come to the floor for a vote.

As in the prior proposal, the language in HJR 26 provides a spending limit on what can be currently spent or, in legislative parlance, appropriated. The existing constitutional language establishing the Alaska Permanent Fund only prohibits the appropriation of principal. In other words, anything but "principal" is income and can be spent.

Since the first Board of Trustees, 23 years ago, the Permanent Fund corporation has calculated principal as a notational number that simply equals the sum of the constitutionally mandated 25 percent of mineral deposits and the non-mandated (or voluntary) deposits the legislature has chosen to make. Principal does not vary or move up or down with the market.

Unlike the present statutory provision for inflation-proofing, HJR 26 provides for inflation-proofing of the entire Fund. But clearly, one of the most important reasons to support the proposal is that it would maximize distributions over the long term by establishing a percent of market value spending limit. By eliminating the distinction between principal and income, this proposal would also avoid the situation where market volatility on the down side prevents any distribution from the fund for any purpose, whether for dividends or anything else.

This is significant because since 1982, Alaska's fiscal picture has changed dramatically. The Alaska Permanent Fund can be reasonably expected to produce more future state revenue than any single Alaska resource – more than oil or natural gas, more than fishing or any other natural resource.

Whatever future decisions are made by the legislature or the voters regarding the use of Fund earnings, the five percent payout of market value limit will assure complete and protected inflation-proofing while providing predictable and sustainable distributions over the long term.

In managing Alaska's fishery stocks, the only sensible choice is to avoid taking too much of any fish stock so that, over the long term, the harvest is maximized. Of course, over-harvesting can reap short-term rewards of more fish, but the inevitable result is, at best, fewer fish, and at worst, permanent impairment or destruction of a fisheries stock. The same is true for managing distributions from a large investment fund like the Alaska Permanent Fund.

I want to close by emphasizing two key points regarding the Board's proposed constitutional amendment. The first point is that if Alaska is going to have a Fund that is truly permanent, we must take those steps necessary to ensure permanence. This means investing for future generations as well as current generations. This will require commitment to basic principles of long-term investing.

But the critical flip side of a sound long-term investment strategy is a sound, sustainable, and predictable distribution plan – a plan that will sustain and provide benefits to each generation of Alaskans.

The second and last point I want to leave you with is that if the Permanent Fund is going to continue to serve each generation of Alaskans it has to be able to make distributions so that current generations receive some benefit while not

"over harvesting" the fund so that there is little or nothing left for future generations.

We all want to avoid, at all costs, defaulting to the position where the Constitutional Budget Reserve (or "CBR") is today. Within the next three to four years, the CBR is destined for extinction. As the investment horizon of the CBR steadily shortens, it will be necessary to keep the assets of the CBR in very short-term and less-profitable investments.

I believe that as the day of the CBR's demise grows near, the Trustees and staff of the Fund may have to seriously consider a shorter investment horizon for a significant portion of the Fund.

So, whether we liken the Alaska Permanent Fund to a resource industry like Alaska's fisheries, one thing is clear: the Alaska Permanent Fund can continue to import significant new money into our state year after year.

Properly invested and protected, the Alaska Permanent Fund will successfully convert the non-renewable petroleum wealth of our State into a permanent and substantial stream of revenue for generations after the last barrel of oil has been pumped.

Legislative passage and voter approval of the Board's proposed amendment would protect the ability of the Fund to be managed for the long-term and to continue to pour money into the Alaska economy over the long-term.

The proposed constitutional change before you in the form of HJR 26 is more compatible with the Fund's diversified, long-term investment strategy of achieving a five percent real rate of return over time. The present constitutional

language was designed over a quarter century ago for a Fund that was invested 100 percent in bonds.

I believe that succeeding generations will rightly view this proposed amendment with the same degree of appreciation and admiration as the original one Alaskans overwhelmingly approved 27 years ago. The Trustees believe that this proposal for complete and protected inflation-proofing makes ultimate good sense for Alaska's Permanent Fund and for Alaska's future.

Alaska Permanent Fund Corporation
Analysis of House Joint Resolution (HJR) 26
March, 2004

OVERVIEW

The Resolution proposes changes to the Alaska Constitution Article IX, Section 15, which governs the Alaska Permanent Fund. The latest version of the Resolution is CSHJR 26 (JUD).

SUMMARY OF CHANGES

1) Page 1, line 10. Adds a reference to the new subparagraph (b) being added to the constitution.

2) Page 1, line 11. Removes the words "the principal of which" from the constitution. This change removes the distinction between the principal and the earnings reserve. The Fund becomes one pool of money versus two.

3) Page 1, lines 13 & 14. Deletes the guidance for where income of the Fund should be deposited. The intent is for all income to remain in the Fund until appropriated by the Legislature.

4) Page 2, lines 2 – 4. Adds a new subparagraph (b) that establishes an annual payout limit of 5% of the total market value of the Fund. The market value will be based on a five-year average. This is to protect the Fund from inflation and preserve the real value over the long term. Additionally, this provision allows the legislature and the administration to know one year in advance the amount available for appropriation.

5) Page 2, line 7 – 10. Adds a transitional provision that makes clear the balance in the Fund's earnings reserve remains in the Permanent Fund. Some have argued that the earnings reserve belongs in the General Fund.

6) Page 2, lines 11 - 13. States that the amendments will be placed before the voters at the next general election.

Alaska Permanent Fund

House Finance Committee

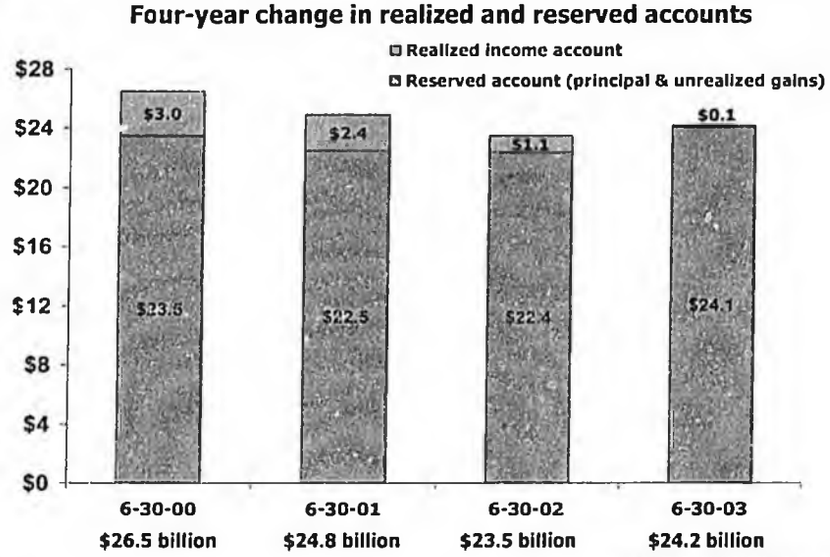
A Fund overview and discussion of POMV

"To benefit all generations..."

AS 37.13.020 (1)

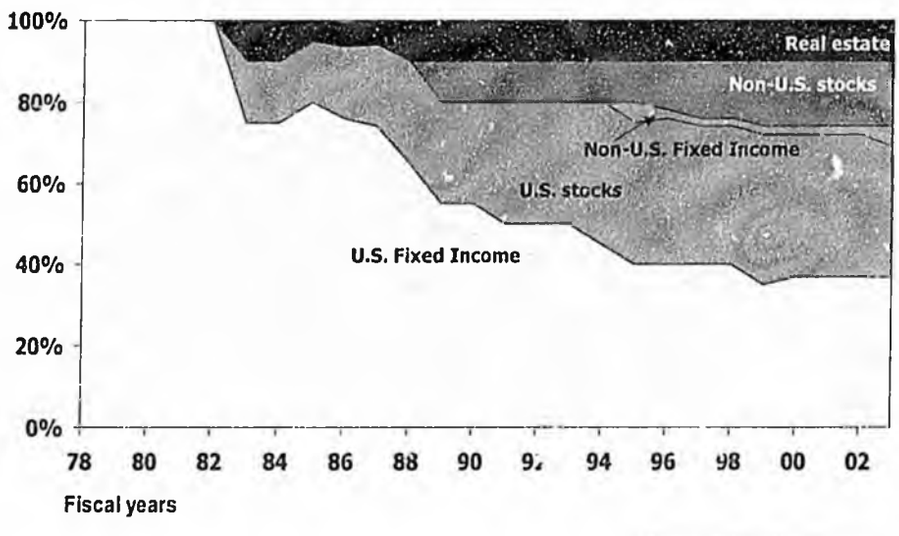
...the Fund should provide
a means of conserving a portion
of the state's revenue from mineral resources
to benefit all generations of Alaskans.

Permanent Fund market value



ACCOUNTABILITY

Fund's historical asset allocation



ACCOUNTABILITY

Trustees' proposal

The APFC Board of Trustees propose
a constitutional amendment
to limit annual fund spending
to five **p**ercent
of the Fund's total **m**arket **v**alue.

POMV

ACCOUNTABILITY
TO ALASKANS FOR ALASKANS

What is POMV?

POMV, or "Percent of Market Value," is a formula that limits spending to a set percent of a fund's total market value.

The set percent is based on the expected difference between total annual return on investments and the rate of inflation.

8% **projected average annual return**

-3% **projected average annual inflation**

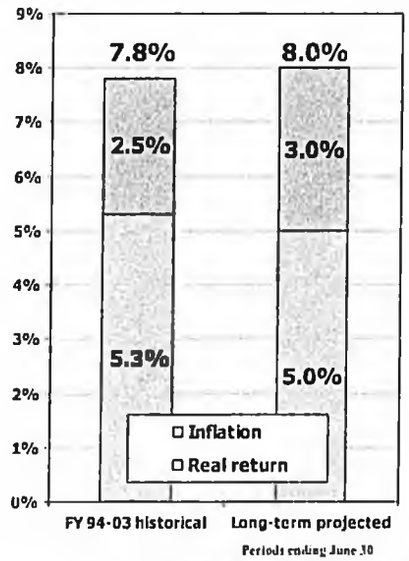
5% **maximum annual sustainable payout**

retained in the Fund for inflation proofing

ACCOUNTABILITY
TO ALASKANS FOR ALASKANS

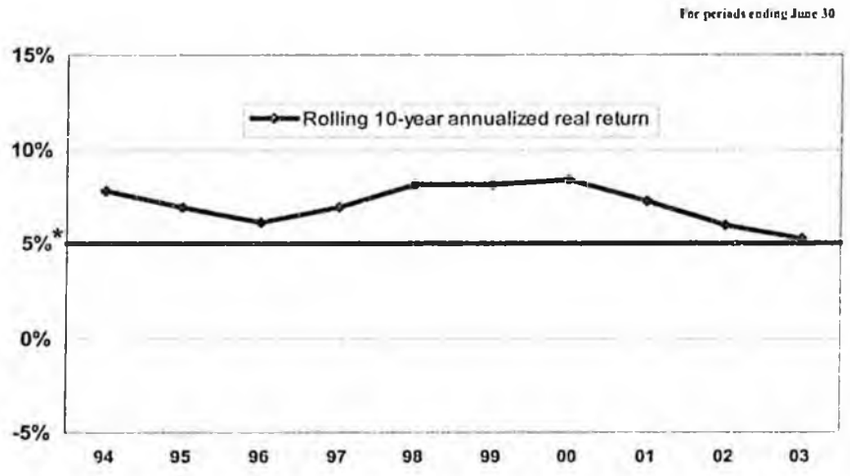
Fund performance

- Historically, Fund returns would have hit their long-term real rate of return target.
- Fund returns going forward, after adjusting for inflation, are expected to meet the target payout rate over time.



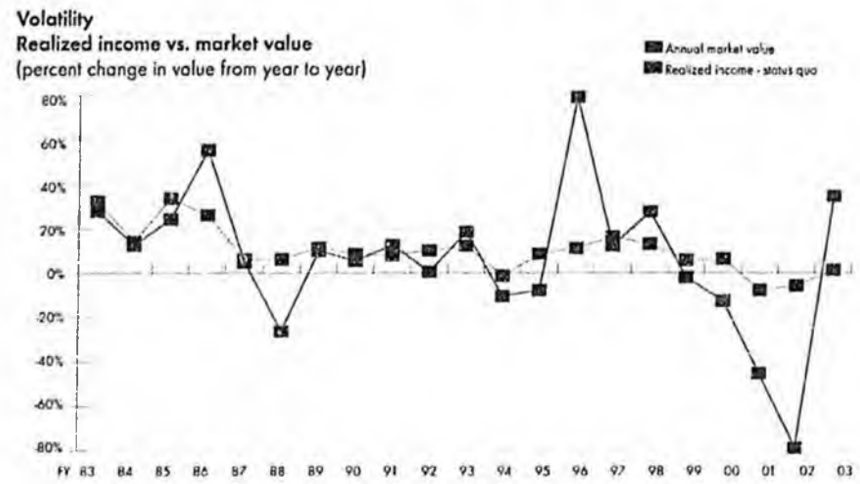
ACCOUNTABILITY 3

Rolling 10-year real return



ACCOUNTABILITY

Realized income v. market value



ACCOUNTABILITY

Why do we need POMV?

For the present

- Ensure the option of an annual payout
- Make payout amounts more stable from year to year
- Make payout method compatible with investment strategy

For the future

- Prevent overspending in the good years
- Maintain purchasing power for the entire Fund

ACCOUNTABILITY

What are Alaskans asking?

- **Will this change leave the principal unprotected?**
- **How will POMV affect my dividend?**
- **Is POMV a raid on the Permanent Fund?**
- **Why fix the Permanent Fund if it isn't broken?**

ACCOUNTABILITY
TO ALL ALASKANS, FOR ALASKANS

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Finance
P.O. Box 113200
Juneau, AK 99811-3200
(907) 465-3795
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MEMORANDUM

DATE: February 17, 2004

TO: Senator Lyman Hoffman

FROM: David Teal, Director

SUBJECT: Potential Impact of POMV on Dividends and Government Operations

Some time ago, we discussed the impact the Percent of Market Value (POMV) approach to managing the Permanent Fund might have on Permanent Fund Dividends (PFDs) and the state's fiscal gap. As you know, the POMV plan proposes an annual payout of up to five percent of the market value of the Permanent Fund but does not specify how that payout would be divided between dividends and government operations. I suggested that the split between uses did not have to be set in concrete; in fact, POMV did not require any change in calculation of the dividend. You asked me to describe the impact POMV might have on dividends and government operations.

The issue is less technical than philosophical. A guarantee that the legislature will follow the plan appears to be the key goal of POMV proponents. The POMV approach could be implemented by statute rather than by Constitutional amendment, but only a Constitutional amendment can guarantee the results desired by proponents of the plan. The desired result appears to be growth (not merely protection of the existing balance) of the Permanent Fund. Legislative Finance cannot answer the philosophical questions associated with a change to POMV, but we can discuss the technical impact. From a budgetary perspective, analysis of proposals affecting the Permanent Fund boils down to three questions

1. What happens to the Earnings Reserve account?
2. What happens to PFDs?
3. What happens to the fiscal gap?

Although the POMV proposal appears simple, each of the above questions raises some complex points to consider.

1. What happens to the Earnings Reserve Account (ERA) under POMV?

Future Earnings—under existing statutes, earnings accumulate in the ERA and are used for dividends and inflation proofing. Surplus earnings (that is, the remaining balance of the ERA) are available for appropriation for any purpose. Under POMV, Permanent Fund earnings would remain in the Permanent Fund and would not be available for appropriation except as discussed below.

The Balance—under POMV, the ERA will no longer be available as budget reserves because the account will be merged with Permanent Fund principal and the only money that can flow from the Permanent Fund is the 5% annual payout. The ERA balance would not be available to reload the Constitutional Budget Reserve Fund or otherwise fill the fiscal gap.

Limiting access to future earnings and the ERA balance has huge implications. The Permanent Fund would cease being a Trust with untouchable principal and would become an endowment. Fund principal would be less protected under POMV than under the Trust approach.[1] Endowment principal might be subject to erosion under POMV, but proponents of POMV appear willing to trade that protection for a probable increase in Fund growth.

The Permanent Fund Trustees refer to POMV as a management tool. POMV appears to have less value as an asset management tool than as a tool to enlarge the Fund. As the fiscal gap grows and the CBR shrinks, the Fund Trustees undoubtedly perceive the ERA as endangered because it offers one of the few viable means of filling the fiscal gap. The key to Fund growth under POMV is that earnings in excess of 5% of market value would not be available for appropriation, but would remain in the Fund.

Inflation Proofing—under existing statute, inflation proofing is appropriated from the ERA to principal. Under POMV, earnings in excess of the payout can be considered inflation proofing. Inflation proofing under POMV could be substantially higher than under the current system because

- the market value of the entire Fund (not just principal) will be inflation proofed and
- any "extra" earnings beyond the payout remain in the Permanent Fund as inflation proofing, regardless of the actual rate of inflation.

From the Fund's perspective, inflation proofing may be a more important issue than the disposition of the ERA; inflation-proofing transfers under existing statutes are far larger than the expected share

[1] Footnote added March 16, 2004. Any Trust that invests in equities is subject to loss of principal (because equities can lose value). This discussion applies to *appropriation* of principal. No money can now be appropriated from the Permanent Fund itself. Under POMV, principal could be appropriated from the Fund. The implications are more theoretical than practical; no principal will be lost under Trust or Endowment if investment returns are within historical norms.

of POMV payout that would be available for government operations. If the fiscal gap can no longer be filled with draws from the Constitutional Budget Reserve Fund (CBR), there will be increased pressure to use the ERA to fill the gap. At some point, it will be argued that simultaneously adding to the Fund (via inflation proofing) and removing money from the Fund (for government operations) makes little sense.

Discontinuing (or reducing) inflation-proofing appropriations is the most painless means available to obtain money to fill fiscal gaps. Reducing inflation proofing would make money available for government operations while removing no money from the economy (as increased taxes or reductions of PFDs would do).

Arguably, the legislature has vastly over-inflation-proofed the Fund by making large transfers from the ERA to principal when ERA balances were high. About one third of the market value of the Fund is attributable to these special deposits.

No inflation-proofing appropriation is necessary under POMV. By making inflation proofing automatic (and self-adjusting to "grab" all earnings in excess of the 5% payout), POMV protects the Fund (more accurately, protects *growth* of the Fund) by eliminating an attractive tool for filling future fiscal gaps.

2. What happens to PFDs under POMV?

The key point regarding PFDs is that any reduction in the Permanent Fund balance (including the ERA) reduces future dividends. This applies to use of earnings for any purpose other than inflation proofing (which simply moves money from the ERA to principal). As Fund balances are used, market value and future earnings potential decline, reducing the amount available for funding future PFDs.

If we replace the current dividend formula with a fixed split of the 5% payout, dividends would not necessarily be lower than under the current method of calculation. The amount of dividends would, of course, depend on the split between dividends and government operations. Returning to the key point: any portion of the payout used for government operations would reduce future dividends (relative to a scenario in which Fund earnings are used only for dividends and inflation proofing).

Stopping this decay of dividend payments would require that a growing share of the total payout go to dividends. Unfortunately, a growing fiscal gap and a shrinking share of the payout available for government operations would make POMV an uncertain means of filling the fiscal gap.

The more likely scenario is that filling the fiscal gap would become the driving force in decisions regarding use of the payout; there would be pressure to use an increasing share of the payout for government operations as the size of the gap increases. The most obvious way to reduce this pressure is to specify provisions for the dividend in the Constitution.

In any case, the issue is not so much a technical problem as a political and a marketing issue. The marketing aspect is important because public acceptance of POMV may depend on how the public perceives the proposal's impact on dividends.

The marketing aspect of dividend calculation prompted the suggestion that the current formula for computing dividends could be retained under POMV. The statutory formula simply specifies that about half of average realized net income may be used for dividends. POMV would not affect the ability to calculate this amount. Note, however, that POMV might limit the ability to pay the calculated dividend, just as existing law limits the dividend to the balance of the ERA.

The advantage to retaining the current formula is that doing so would end arguments about how (and how fairly) the payout would be split between dividends and government operations. The dividend would be calculated exactly as it is now, and the portion of the 5% payout not used for dividends would be available for government operations. Higher Permanent Fund earnings would generate higher dividends (taking a larger share of the 5% payout) while poor earnings would reduce dividends and leave more of the payout for government operations. If earnings were very high, the dividend calculation could produce an amount that exceeds the 5% payout. In that case, dividends would consume the entire payout.

A variable split of the POMV payout would provide a less stable cash flow for government operations than would a fixed split. Variability is not a particularly severe problem; the variations would be fairly predictable and pose no fiscal problem if the Constitutional Budget Reserve Fund held balances sufficient to absorb the variability.

When considering the option of retaining the existing dividend formula, it is important to differentiate between the *formula* and *money-in-pocket*. Retaining the formula is no guarantee that dividends won't change. Returning again to the key point: using the current formula *will* reduce dividends if money is diverted from the Fund balance (because a lower balance will generate lower earnings). Although POMV by itself does not divert money, the proposal is being marketed as a partial solution to the fiscal gap, implying that some money would be used for government operations.

3. What happens to the fiscal gap under POMV?

There can be no certain answer to this question until all elements of the plan are clearly specified. The fiscal gap was discussed above, but there are a few more points to ponder.

The impact on the fiscal gap depends on how much of the POMV payout goes to the general fund and how much to dividends. It appears unlikely that the payout will be sufficient to fill future fiscal gaps completely if current dividend levels are retained.

If inflation is higher than the real rate of return on Fund investments, the "payout of *up to* five percent of market value" clause becomes interesting. There may be some pressure to appropriate less than 5% of the market value if a full payout meant less-than-full inflation proofing. This would leave less money to fill the fiscal gap.

- POMV would affect access to the Constitutional Budget Reserve Fund (CBR). The primary reason simple majority access to the CBR has not been a viable option in most years is that a large ERA balance makes the simple majority trigger conditions impossible to meet. By eliminating the ERA and providing a relatively stable flow of revenue available for appropriation, POMV greatly increases the probability of filling the fiscal gap with a simple majority vote to access the CBR.
- POMV's primary impact is enhanced protection of growth of the Permanent Fund. All of POMV's impact on dividends, inflation proofing, and the fiscal gap can be accomplished without a Constitutional amendment.

Summary

The bottom line is that POMV is a promising option for those who want to ensure continued growth of the Permanent Fund, particularly for those who are convinced that the ERA and/or inflation proofing are endangered by the continuation/growth of the fiscal gap. POMV is less attractive to those who prefer maximum flexibility to use Permanent Fund earnings to fill the fiscal gap. Retaining the current dividend formula under POMV may be a useful marketing tool, but may be somewhat disingenuous if the purpose is to make people believe that retaining the formula is equivalent to retaining the same level of dividends. Any use of Fund earnings for government operations will reduce future dividends.

HJR

48

HOUSE JOINT RESOLUTION NO. 48

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE HOUSE SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT, INTERNATIONAL TRADE, AND TOURISM

Introduced: 4/22/04
Referred: Rules

Om # 1
Ont to the people of Taiwan

A RESOLUTION

Sending a message of goodwill to President Chen Shui-bian, and reaffirming the Alaska State Legislature's 2003 resolution urging the United States Congress to support the granting of official Observer Status to the Republic of China and to support negotiation of a free trade agreement with the Republic of China.

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

WHEREAS President Chen Shui-bian has been reelected as President of the Republic of China; and

WHEREAS Legislative Resolve No. 29, passed by the Alaska State Legislature in the First Regular Session of the Twenty-Third Legislature, continues to reflect the view of the legislature; and

WHEREAS the United States, including the State of Alaska, and the Republic of China, in Taiwan, have long been valued and close partners in trade and cultural exchanges; and

WHEREAS the Republic of China is the eighth largest trading partner of the United States and is a significant trading partner of the State of Alaska; and

WHEREAS the Republic of China is showing signs of significant potential for increasing trade with the United States and the State of Alaska as the world economy continues to recover from recession; and

WHEREAS free trade among the peoples of the world is of vital importance to the United States, including the citizens of Alaska, and to the Republic of China; and

WHEREAS the importance of free trade is strongly acknowledged in Alaska, the Municipality of Anchorage and the City of Taipei having signed a Partner Cities Agreement to encourage trade and cultural exchange; and

WHEREAS the United States and the Republic of China have, for decades, been willing signers of mutual defense treaties; and

WHEREAS the health of the peoples of the world is of vital importance to the United States, including the citizens of Alaska, and to the Republic of China; and

WHEREAS the people of the United States and the Republic of China have generously contributed to programs that benefit the health of the peoples of the world; and

WHEREAS it would be mutually beneficial to the people of the United States, including Alaska, and the people of the Republic of China to both assist and realize a continuation of international efforts the goal of which is to expand and further develop health-related knowledge; and

WHEREAS today there is a strong need for the rapid and complete international dissemination of health-medical information and research results in view of the recent outbreak of the Severe Acute Respiratory Syndrome (SARS), considered to be a worldwide health threat;

BE IT RESOLVED that the Alaska State Legislature continues to encourage the United States Congress to authorize the United States to endorse the request by the Republic of China to be granted official Observer Status at the World Health Organization; and be it

FURTHER RESOLVED that the Alaska State Legislature again urges the United States Congress to encourage the administration of President George W. Bush to negotiate a free trade agreement with the Republic of China; and be it

FURTHER RESOLVED that the Alaska State Legislature sends a message of goodwill to President Chen Shui-bian regarding his reelection and reaffirming the State of Alaska's relationship with the Republic of China.