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

Foreign Intelligence Investigations

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

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

§110.

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

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

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

³¹ 50 U.S.C. 1801 *et seq.*

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

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

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

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

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

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

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

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

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

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

- permits "roving" surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a *significant* reason for the application rather than *the* reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American's exercise of his or her First Amendment rights.

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

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

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

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, *Draft* at §151.³⁶

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

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

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

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

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

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

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

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

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

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

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

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.⁴⁰

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

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

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

In a related provision, Section 358 amends the –

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

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

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

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

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

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

Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, "effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles," H.R.Rep.No. 107-63, at 10 (2001). The Justice Department's consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.⁴⁴

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

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

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

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

Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft* at §354.⁴⁵

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft* at §154.⁴⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Money Laundering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

business transactions.

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

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

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

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

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

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

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

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

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

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 business⁶⁴) 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-

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 insight 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

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(k). 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

"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.

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.

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;

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 confiscated \$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

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

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

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

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.

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

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

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

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

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 1957, 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

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."

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 Customs 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 1008¹⁰⁴
- 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 for 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.

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. 1182(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 421¹⁰⁵
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422¹⁰⁶

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 nonimmigrant 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 423¹⁰⁷
- 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 424¹⁰⁸
- 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

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 31.

"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 permanent 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 offense 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

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:

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

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;

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 aboard 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;

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 aboard 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).

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*, 199 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

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

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

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

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

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

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.Ci: 1985)("if American officials or officers participated in some significant way"); *United State 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

¹³⁶ Summarizing the law in place at the time, the Department of Justice argued that, "The statutory provisions governing the collection of DNA samples from 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 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 terrorism¹³⁹ 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

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. Murion*, 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.

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:

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 be 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

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.

Proposed Amendment to CS HJR 22:

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

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

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

Page 3, line 1: Delete all and insert:

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

1 AMENDMENT NO. #1

2 By: Representative Guttenberg

*in current
version
just
IDam*

3
4 TO: CSHJR 22 (JUD)

5 WORK DRAFT 23-LS0924 5/8/03

6 Page 2, Line 2

7 DELETE: "Adequate Tools In Opposition to"

8 INSERT after "Provides":

9 "Appropriate Tools Required to Intercept and Obstruct"

10

11

12

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14

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16

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23-LS0924\D
Cook
5/8/03

**CS FOR HOUSE JOINT RESOLUTION NO. 22(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION**

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES GUTTENBERG, Crawford, Kerttula

A RESOLUTION

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

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

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

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

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

11 **WHEREAS** attacks against Americans such as those that occurred on September 11,
12 2001, have necessitated the crafting of effective laws to protect the public from terrorist
13 attacks; and

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

1 WHEREAS certain provisions of the Uniting and Strengthening America by
2 Providing Adequate Tools In Opposition to Terrorism Act, also known as the USA PATRIOT
3 Act, allow the federal government more liberally to detain and investigate citizens and engage
4 in surveillance activities that may violate or offend the rights and liberties guaranteed by our
5 state and federal constitutions;

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

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

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

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

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

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

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

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

29 (2) collect or maintain information about the political, religious, or social
30 views, associations, or activities of any individual, group, association, organization,
31 corporation, business, or partnership;

1 (3) profile based on race, ethnicity, religion, or national origin; and be it

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

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

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

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

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

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1007 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Joan M. Kasson
 Division: Attorney General's Office
 Approved by: Joan M. Kasson for Gregg D. Renkes, Attorney General
 Agency: Department of Law

Phone (907) 465-5370
 Date/Time 5/5/03 5:34 PM
 Date 5/5/2003

Session:

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

*Alaska State Legislature
Representative David Guttenberg*



District 8

Interim:

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

**Sponsor Statement
HJR 22 Patriot Act and Defending Civil Liberties**

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

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

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

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

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

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

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

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

ALASKA STATE HOUSE OF REPRESENTATIVES

Interim Address:

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



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

REPRESENTATIVE JOHN COGHILL

HJR 23 PATRIOT ACT RESOLUTION SPONSOR STATEMENT

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

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

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

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

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

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

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

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

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

Fairbanks Daily News-Miner

Callers testify against Patriot Act

By TOM MORAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

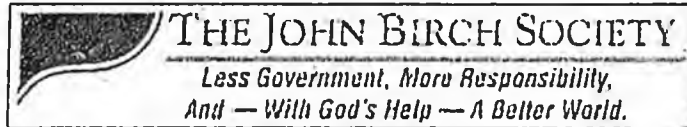
If Alaska passes a resolution, it would become the second state to sponsor such a measure; Hawaii passed one last month. Almost 100 communities nationwide, including four in Alaska, have also passed measures expressing concern about the act.

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

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The Un-American Patriot Act

by Steve Bonta

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

RESOLUTION NO. 4036, As Amended

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

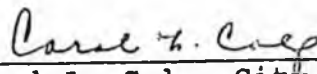
5. profiling based on race, ethnicity, citizenship, religion, or political values.

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

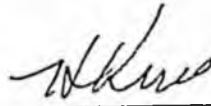

Steve M. Thompson, Mayor

AYES: 5
NAYES: 0
ABSTAIN:
ABSENT: 11

ATTEST:


Carol L. Colp, City Clerk

APPROVED AS TO FORM:


Herbert P. Kuss, City Attorney

American Civil Liberties Union

www.aclu.org

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

Gustavus, AK Community Resolution
February 24, 2003

A RESOLUTION TO DEFEND THE BILL OF RIGHTS AND CIVIL LIBERTIES

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

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

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

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

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

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

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

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

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

1. any initiation of participation in, assistance or cooperation with any inquiry, investigation, surveillance or detention; and
2. the recording, filing and sharing of any intelligence information concerning any person or organization, even if authorized by federal law enforcement, acting under new powers granted by the USA PATRIOT Act or

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

PASSED AND APPROVED: February 13, 2003

Ayes: 13

Noes: 8

Abstain: 2

Now More Than Ever: Help The ACLU Turn Back Assaults on Our Freedoms!

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125 Broad Street, 18th Floor, New York, NY 10004

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

**CITY OF NORTH POLE
RESOLUTION 03-06**

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

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

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

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

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

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

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

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

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

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

JEFFREY JAMES JACOBSON,

Mayor

ATTEST:

KATHRYN WEBER, City Clerk